ENTERED

F 2302

San Francisco Law Library

436 CITY HALL

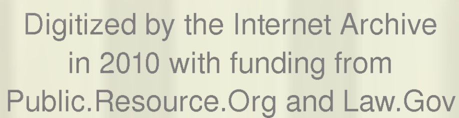
No. 159448

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.


Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs2928

N. 2928

No. 14656

United States Court of Appeals

For the Ninth Circuit

See vols. 2926-2927

Hans Forster, *Appellant,*

vs.

United States of America, *Appellee.*

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

Tracy E. Griffin,
J. Kenneth Brody,
Attorneys for Appellant.

603 Central Building,
Seattle 4, Washington.

The Argus Press, Seattle

FILED
JAN 13 1956

No. 14656

United States Court of Appeals

For the Ninth Circuit

HANS FORSTER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

TRACY E. GRIFFIN,
J. KENNETH BRODY,
Attorneys for Appellant.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Statement of Jurisdiction	1
Statement of the Case	2
Specification of Errors	9
Argument	14
Summary of Argument	14
I. The trial court's additional instruction on willfulness was erroneous	16
A. The additional instruction and the circumstances under which it was given	16
B. This court, in the Bloch case, declared the additional instruction on willfulness to be erroneous	21
C. The Murdock case involved a misdemeanor statute	25
D. The Supreme Court has distinguished between the misdemeanor and felony statutes	28
E. Willfulness under Sec. 145(b) must comprehend a specific wrongful intent to evade a known tax obligation	34
F. The instant case may be distinguished upon the instruction given from all other cases in which a similar instruction on willfulness was given	37
G. The giving of the Murdock instruction as a separate instruction at the special request of the jury created incurable error	44
H. Summary	47
II. The trial court erroneously excluded appellant's offered rebuttal testimony	48
A. The significance of the rebuttal testimony	48
B. Appellant was entitled to rebut the case propounded by the defendant Taylor	51
C. Material matters elicited on cross-examination may always be rebutted	52
D. Analysis of the rebuttal testimony which was offered and rejected	54

Page

(1) The testimony of Phillip A. Strack........ 54
(2) The testimony of Frank B. Donaldson 63
(3) The testimony of Quentin H. Ellis........ 64
(4) The testimony of Vern Egenes.............. 66

E. Summary 68

III. The trial court erred in denying appellant's motion for mistrial based upon charges contained in the opening statement of counsel for defendant Taylor and directed against counsel for appellant 70

A. The nature of the charges and the failure of proof in substantiation thereof........................ 70

1. The charge that Taylor pleaded guilty to charges of evasion of personal income tax upon the advice of Kachlein in furtherance of the alleged conspiracy............ 72
2. The charge that Kachlein had represented appellant prior to Taylor's plea of guilty 73
3. The charge that Kachlein went to Taylor's house and went through Taylor's personal files and records in furtherance of the alleged conspiracy........................ 74
4. The charge that Kachlein claimed privilege as to books and records of Taylor in furtherance of the alleged conspiracy...... 75
5. The charge that Kachlein gave directions to Taylor's employees................................ 76
6. The charge that Kachlein advised Taylor to take a vacation during a critical period in the investigation in furtherance of the alleged conspiracy........................ 77
7. The charge that Kachlein had stated to the revenue agents that Taylor was responsible for deficiencies in tax returns of appellant and appellant's corporate enterprise 77
8. The termination of the Kachlein-Taylor relationship conclusively disproved the alleged conspiracy.. 79

Page

B. Appellant's motion for mistrial based upon statements contained in the opening argument of counsel for defendant should have been granted because the issue raised was irrelevant, immaterial and incompetent........ 80
C. The misconduct of Taylor's counsel in inserting this issue into the case is ground for reversal 83
D. Improper statements contained in the opening argument of counsel for Taylor could not be cured by the court's instruction........ 88
E. The trial court should have declared a mistrial at the conclusion of the evidence........ 91
F. The trial court erred in refusing appellant's motion for a new trial........ 94

Conclusion 94

TABLE OF CASES

Attorney General v. Hitchcock, 1 Exch. 104........52, 53
Banks v. United States (C.A. 8, 1955) 223 F.(2d) 884 ....25, 33, 44
Bateman v. United States (C.A. 9, 1954) 212 F.(2d) 61 ....33, 38, 40
Berger v. United States, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629........85, 89, 92
Berkovitz v. United States (C.A. 5, 1954) 213 F. (2d) 468 ....33, 40, 41
Bloch v. United States (C.A. 9, 1955) 221 F.(2d) 786........14, 21, 22, 23, 24, 25, 37, 38, 43, 44, 46, 47
Bloch v. United States (C.A. 9, 1955) 223 F.(2d) 297 24
Bollenbach v. United States, 326 U.S. 607, 90 L.Ed. 350, 66 S.Ct. 402........14, 45, 46, 47, 49
Brown v. Walter (C.A. 2, 1933) 62 F.(2d) 798......87, 92
Estep v. United States, 327 U.S. 114, 90 L.Ed. 567, 66 S.Ct. 423 46
Ewing v. United States (C.A.D.C., 1942) 135 F.(2d) 633 53
Gariepy v. United States (C.A. 6, 1955) 220 F.(2d) 252 36

Page

Gaunt v. United States (C.A. 1, 1950) 184 F.(2d) 284 ... 36, 37
Guthrie v. United States (C.A.D.C., 1953) 207 F. (2d) 19 ... 80
Hamilton v. United States (C.A. 5, 1955) 221 F. (2d) 611 ... 46
Haigler v. United States (C.A. 10, 1949) 172 F.(2d) 986 ... 35
Hargrove v. United States (C.A. 5, 1933) 67 F.(2d) 820 ... 34
Herzog v. United States (C.A. 9, 1955) 226 F.(2d) 561 ... 43, 44, 92, 93
Johnston v. United States (C.A. 9, 1907) 154 Fed. 445 ... 92
Jones v. United States (C.A. 5, 1947) 164 F.(2d) 398 ... 34
Kitchen v. United States (C.A.D.C., 1953) 205 F. (2d) 720 ... 46
Latham v. United States (C.A. 5, 1915) 226 Fed. 420 ... 88, 90
Legatos v. United States (C.A. 9, 1955) 222 F.(2d) 678 ... 33, 41, 42, 43
Levinson v. Fidelity & Casualty Co. of New York (Ill.) 181 N.E. 321 ... 88, 90
M. Kraus & Bros. v. United States, 327 U.S. 614, 90 L.Ed. 894, 66 S.Ct. 705 ... 46
Masterson v. Chicago & Northwestern Railway Co. (Wisc.) 78 N.W. 757 ... 88, 92
McFarland v. United States (C.A.D.C., 1949) 174 F.(2d) 538 ... 46
Minker v. United States (C.A. 3, 1936) 85 F.(2d) 425 ... 88, 90
Missouri-K.-T. Railroad Co. v. Ridgway (C.A. 8, 1951) 191 F.(2d) 363 ... 88
Morrisette v. United States, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 ... 41
New York Central Railroad Co. v. Johnson, 279 U.S. 310, 73 L.Ed. 706, 49 S.Ct. 300 ... 86, 91, 92

Page

Nye & Nissen v. United States (C.A. 9, 1948) 168 F. (2d) 846 .... 52, 53
Pharr v. United States (C.A. 6, 1931) 48 F.(2d) 767 .... 88, 90
Pierce v. United States (C.A. 6, 1936) 86 F.(2d) 949 85
Read v. United States (C.A. 8, 1930) 42 F.(2d) 636 .... 86, 92
Robinson v. United States (C.A. 8, 1928) 32 F.(2d) 505 .... 88, 89
Shanahan v. Southern Pacific Co. (C.A. 9, 1951) 188 F.(2d) 564 52-53
Skuy v. United States (C.A. 8, 1919) 261 Fed. 316 .... 88, 92
Spies v. United States, 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364 .... 14, 28, 33, 47
Towbin v. United States (C.A. 10, 1938) 93 F.(2d) 861 88
United States v. Antonelli Fireworks Co. (C.A. 2, 1946) 155 F.(2d) 631 84
United States v. Bardin (C.A. 7, 1955) 224 F.(2d) 255 34
United States v. Donnelly (C.A. 7, 1950) 179 F.(2d) 227 46
United States v. Krulewitch (C.A. 2, 1944) 145 F. (2d) 76 82
United States v. Levi (C.A. 7, 1949) 177 F.(2d) 827.. 46
United States v. Martell (C.A. 3, 1952) 199 F.(2d) 670 34
United States v. Murdock, 290 U.S. 389, 78 L.Ed. 381, 54 S.Ct. 223
14, 22, 23, 25, 26, 27, 31, 33, 34, 39, 42, 43, 44, 47
United States v. Pincourt (C.A. 3, 1946) 159 F.(2d) 917 53
United States v. Stoehr (U.S.D.C. Pa., 1951) 100 F. Supp. 143 54
Van Gorder v. United States (C.A. 8, 1927) 21 F. (2d) 939 .... 91, 92

Page

Volkmor v. United States (C.A. 6, 1926) 13 F.(2d) 594 .... 88, 90, 92

Wardlaw v. United States (C.A. 5, 1953) 203 F.(2d) 884 41

Woolworth Co. v. Wilson (C.A. 5, 1934) 74 F.(2d) 439 87

TEXTBOOKS

Wigmore on Evidence, 3rd Edition, 1940

Sections 29a, 42 82

Sections 916 (3), 916 (5) 51

Section 1001 52

Section 1003 52

Section 1004 52

Section 1005 52

STATUTES

Revenue Act of 1926, 44 Stat. 116, Section 1114 (a) 23, 26, 27

Revenue Act of 1928, 45 Stat. 835, Section 146 (a) 23, 26, 27

Revenue Act of 1939, 53 Stat. 62

26 U.S.C. 145(a) 14, 26, 28

26 U.S.C. 145(b) 1, 14, 28, 31, 32, 33, 34, 37, 47

18 U.S.C.A. 3772, 62 Stat. 846 1

28 U.S.C.A. 1291, 62 Stat. 929 1

COURT RULES

Federal Rules of Criminal Procedure, 18 U.S.C.

30 .... 44, 93

37 1

39 1

52(b) 44, 93

United States Court of Appeals
For the Ninth Circuit

HANS FORSTER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*		No. 14656

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant Forster, L. Hicks Taylor and Harold Erickson were indicted in nine counts under 26 U.S.C. 145(b) (R. 3-10). Appellant entered a plea of not guilty (R. 19). Appellant was found guilty by the jury verdict rendered on May 14, 1954 (R. 15-16). Appellant filed a motion for a new trial (R. 16-17) which the trial court denied (R. 17-18). Judgment, sentence and commitment were entered by the trial court on June 8, 1954 (R. 18-22).

Appeal from this final judgment to this Court is pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3772. Appellant filed notice of appeal on June 11, 1954 (R. 22-24) pursuant to Federal Rule of Criminal Procedure 37 and has perfected this appeal pursuant to Federal Rule of Criminal Procedure 39 and the rules of this court.

STATEMENT OF THE CASE

A. Hans Forster and L. Hicks Taylor

Hans Forster (hereinafter referred to as "appellant") was born in Switzerland in 1904 and was a journeyman cheesemaker when he came to the United States in 1925. His first independent cheesemaking operation was burned out and he took a job with the Issaquah Creamery Company in Issaquah, Washington. His first job there was washing milk cans and later he renewed his cheesemaking operation for the company (R. 829-852).

L. Hicks Taylor was an accountant in independent practice since 1919 (R. 1504), who began regular accounting work for Issaquah Creamery Company in 1928 (R. 1510) while appellant was employed there. He maintained the general ledger of Issaquah Creamery Company, prepared the tax returns and performed numerous other services (R. 1517-1526).

Appellant acquired an interest in Issaquah Creamery Company in 1929 when the company was in distress (R. 853-869). Taylor continued to be in charge of accounting, to make up the tax returns and became secretary and a director of the company (R. 883).

In the middle thirties appellant acquired an interest in Simonson and Forster, Inc., in Puyallup, Washington. Taylor assisted in negotiating the acquisition and drafted the necessary papers for incorporation. He set up the books of the new enterprise and became secretary and treasurer (R. 871-874).

In the thirties appellant developed a fresh milk business in the City of Seattle as an auxiliary to the cream-

ery plant in Issaquah. In 1940 the fresh milk operation was severed from Issaquah Creamery Company and became a sole proprietorship, Alpine Dairy, upon the advice of Taylor who selected attorneys to handle the separation. Appellant participated in none of the negotiations. The books and bookkeeping department of Alpine Dairy were set up by Taylor (R. 881-887).

In 1943 appellant acquired a one-third interest in Renton Ice and Ice Cream Company in Renton, Washington. Taylor negotiated this transaction on behalf of appellant, took over the supervision of the books and records of the company and became secretary, treasurer and a director from the date of its incorporation (R. 893-896).

Taylor also advised appellant as to the acquisition of Finstad & Utgard, Inc., in 1944. He examined the books prior to the purchase and after the purchase set up a new bookkeeping system and made the necessary arrangements for the purchase contract. Taylor became secretary-treasurer of this company (R. 896-901).

Daisy Ice Cream Company was owned by a client of Taylor's who thereby learned that it was for sale. On behalf of appellant, he negotiated appellant's acquisition of this concern which appellant viewed as a subsidiary of Alpine Dairy. Taylor gave the initial instructions as to accounting and deposit of funds for this operation and appellant looked to him for the supervision of its accounting operations (R. 902-908).

Arctic Gardens was a corporation formed for the distribution of frozen foods. Taylor represented appellant's interest in this corporation as an incorporator

and as secretary-treasurer and, in addition, not only inaugurated the bookkeeping system, but actually kept all of the books and records of the company until in 1949, the company gave up the frozen food operation, changed its name to Alpine Ice Cream Company and took over the former Daisy Ice Cream Company operation (R. 909-911).

In 1945 appellant acquired an interest in Apex Farms, Inc., another fresh milk distribution operation in Seattle. Taylor handled all of the accounting aspects of appellant's acquisition of this interest and kept all of the corporate records. Taylor became secretary-treasurer of the corporation (R. 911-914).

In August, 1948, Internal Revenue Agents commenced an investigation of the personal income tax returns of Taylor. On March 2, 1950, Taylor pleaded guilty to one count of tax evasion and served a prison sentence until September 10, 1950 (R. 1595-1597).

Appellant has never made up an income tax return. Until Taylor went to prison in 1950, all income tax returns which were ever filed by appellant, by his wife, or by any corporation in which he had an active interest were made up by Taylor. Appellant received no copies of these returns (R. 969-971). Appellant signed the tax returns but did not read them and paid the amount of tax determined by Taylor (R. 1016). Appellant was himself unacquainted with Federal tax laws and the tax consequences of business transactions and relied upon Taylor in those matters (R. 1401-1402).

B. Origin of Shortages

The shortages set forth in the nine counts of the indictment were not denied. Each defendant denied the element of willfulness. The shortages arose from failure to report certain receipts including: Sales of casein (R. 151-154); salary of appellant from Simonson and Forster (R. 161-162); appellant's share of salaries paid by Renton Ice and Ice Cream Company (R. 162-169); certain checks representing adjustment to milk prices and known as milk equalization checks (R. 175-176); rebates received on the purchase of oil and gasoline (R. 208-211); certain proceeds of the business of Daisy Ice Cream Company (R. 249-250); rental from appellant's farm (R. 256-257); certain discount checks to Alpine Dairy customers which were not delivered and returned to appellant (R. 176-180).

Personal expenses were charged to Issaquah Creamery Company and Alpine Dairy (R. 212-241).

In the books of Issaquah Creamery Company at the end of 1949, purchases and accounts payable were raised by approximately $80,000.00 (R. 242-245). Accounts payable of Renton Ice and Ice Cream Company for the month of July, 1947, were raised $9,000.00 by the device of adding nine "1's" in the accounts payable ledger (R. 2763-2767). Accounts payable at Finstad & Utgard were raised $10,000.00 in the December, 1947, statement (R. 411).

C. Explanation of the Shortages

The defenses of appellant and Taylor created a direct conflict in the testimony. Appellant testified that he had never made an income tax return, that Taylor had made

all personal and corporate returns ever filed by him up to the date of the termination of their relationship (R. 969-971). Appellant further testified that he felt all of his bookkeeping and accounting operations were under the supervision of Taylor and that Taylor knew more about his finances and financial situation than did appellant himself (R. 972-973). In all accounting and tax matters appellant placed complete trust and reliance upon Taylor (R. 971), who was the trustee of a trust established for appellant's children and who was executor under appellant's will (R. 964).

On the other hand Taylor testified that in general he maintained only general ledgers from which he prepared tax returns (R. 1517-1526). He testified that he maintained no personal books or records for appellant, was unacquainted with his savings accounts, did not know how his personal expenses were handled or charged, and was generally unacquainted with any information not contained in the general ledgers of the business enterprises (R. 1526-1545).

Taylor testified that the $80,000.00 increase in accounts payable of Issaquah Creamery Co. for 1949 was a figure supplied to him by Erickson, the bookkeeper, which Taylor unquestioningly accepted (R. 1553-1557). Erickson testified that he had inserted these figures into his books upon direct instructions from Taylor (R. 2564). Forster testified that he was entirely unacquainted with these book entries and first learned of them after Taylor had gone to prison and when a new accounting firm had been hired to make an audit (R. 955-956).

Schneider, the president of Renton Ice and Ice Cream Company, testified directly that he saw Taylor raise the accounts payable for July, 1947, by $9,000.00 (R. 2763-2767). Taylor denied that he had (R. 1571).

Taylor testified that he had not made the alteration of $10,000 in accounts payable in Exhibit A-44 at Finstad & Utgard (R. 2307, 2113-2115). Appellant's offer of proof through Egenes that he did not make the alterations was rejected (R. 2417-2419).

The foregoing necessarily outlines only a portion of the conflicts between the testimony of Taylor and his codefendants which arose in the course of the trial.

D. How the Questions on Appeal Arose

In his opening statement counsel for Taylor accused appellant and his attorney, George F. Kachlein, Jr., of fomenting a conspiracy to "frame" Taylor and to make him the scapegoat for appellant's tax shortages (R. 87-89). Appellant moved for a mistrial on the basis of these charges and the motion was denied (R. 93-95). Following the entry of the verdict appellant filed a motion for acquittal and in the alternative for a new trial naming as one of the grounds errors in law during the trial to which exception was duly taken (R. 16-17) (Specification of Errors 8, 9, 10).

The testimony showed that Taylor had submitted different financial statements to different persons for the same entity as of the same date (A complete outline of this testimony is contained at pp. 54-59, *infra.*). On cross-examination Taylor stated that this was a legitimate practice and that different financial statements could be made up for different purposes (R. 1958-1963).

In rebuttal appellant offered the contrary testimony of the bank officer, Strack, but the offered testimony was excluded (R. 2398) (Specification of Errors 2, 7).

In connection with a certain financial statement, Exhibit 252, Taylor testified that "cash" and "accounts receivable" were interchangeable (R. 2288, 2294). The issue went directly to Taylor's knowledge of appellant's cash position. Appellant offered the contrary testimony of bank officers Strack and Donaldson in rebuttal and this testimony was rejected (R. 2399, 2401) (Specification of Errors 3, 4, 7).

Taylor had denied knowledge of appellant's cash position. In rebuttal appellant offered the testimony of another bank officer, Ellis, to show a conference in 1948 at which Taylor disclosed knowledge of this cash (R. 2323, 2406); but the offer of proof was rejected (Specification of Errors 5, 7).

Taylor had testified that Egenes had made certain alterations to the books of Finstad & Utgard (R. 2307, 2113-2115). Appellant offered in rebuttal the testimony of Egenes that he had not made these alterations; and this testimony was rejected (R. 2417-2419) (Specification of Errors 6, 7).

Taylor testified that this alteration reflected a $10,000.00 bonus paid to shippers in the year 1947 (R. 2115, 2307). Appellant offered in rebuttal the testimony of Egenes that bonuses to shippers for that year totalled $2,139.55; and this offer was rejected (R. 2417-2419) (Specification of Errors 6, 7).

After the jury had retired to its deliberations, it sent a special request to the trial judge for an additional in-

terpretation of the word "willfully" as used in the instructions. The court submitted an additional instruction (R. 2674-2675) to which appellant objected and took exception (R. 2676); following this additional instruction, the jury brought in its verdict of guilty as to appellant (Specification of Errors 1, 10).

SPECIFICATION OF ERRORS

1. The trial court erred in giving, in response to a special request by the jury for an interpretation of the word "willfully," the following additional instruction:

> "Now, to supplement that, as I say again, I am going to give you, in substance, the same matter.
>
> "When used in a criminal statute—that is, the word 'willful' or 'willfully'—when used in a criminal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.
>
> "The word is also characterized—employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act.
>
> "That, I believe, Ladies and Gentlemen, covers the request as you have made it; and so, with that further instruction, you may now be excused and return and continue your deliberations." (R. 2674-2675)

To this additional instruction appellant took exception as follows:

> "I feel obligated—on behalf of the Defendant Forster to except to the use of each and every word in the new instruction just given by the Court and particularly that portion of it dealing with 'reckless disregard.'

> "The instruction does not cover the use of 'good faith,' 'mistake' and rather stultifies the definition given the Jury originally on willfulness which, except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

2. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Strack:

> "Q. Mr. Strack, as a bank officer, will you accept and rely on a financial statement submitted by a borrower if you knew that the borrower had outstanding for the same date a different statement?" (R. 2398)

The question was "objected to as not proper rebuttal, and hypothetical" by counsel for appellee (R. 2398).

In support of the proposed testimony counsel for appellant stated:

> "Your Honor, on Mr. Taylor's redirect examination, he expressed his views at length as to the purpose of financial statements and if rebuttal is not permitted as to those views, he becomes the final authority on that." (R. 2398) * * *
>
> "Mr. Taylor testified with respect to the statements in the 30's that different statements had different purposes; that credit statements were different from income tax statements." (R. 2399)

3. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Strack:

> "Now, Mr. Strack, will you state on a financial statement what is meant by 'cash'?" (R. 2399-2400)

This question was "objected to as not proper rebuttal" by counsel for appellee (R. 2400).

In support of the proposed testimony counsel for appellant stated:

> "Your Honor, this goes again to the statement of the cash on hand, and accounts receivable. I simply wish to ask this witness whether accounts receivable and cash may be interchanged." (R. 2400)

4. The trial court erred in sustaining objection to the following question addressed on direct examination to appellant's rebuttal witness Donaldson:

> "Mr. Donaldson, I will show you plaintiff's Exhibit 123, a financial statement of Hans Forster dated February 29, 1948, in which the entry for cash on hand and in banks is listed as $293,848.11. Will you state, as a banker, what the significance is to you of the entry 'cash on hand and in the banks'?" (R. 2401-2402)

This question was "objected to as not proper rebuttal" by counsel for appellee (R. 2402).

In support of the proposed testimony counsel for appellant stated:

> "The nature is that this was gone into on redirect on the testimony of Mr. Taylor and the significance of cash was explained and an opinion given as to the nature of cash on that sheet." (R. 2402)

5. The trial court erred in rejecting the following offer of proof by appellant's rebuttal witness Quentin Ellis:

> "The offer of proof will be, in substance, that Mr. Ellis phoned Mr. Taylor May 5, 1948, and discussed with him the financial statement dated Feb-

ruary 29, 1948, which had been submitted to the bank; that this was not a secret conference in any manner; that the specific items in the statement were discussed, and among them was the item of cash on hand, and in bank of $293,848.11; that Taylor stated to the witness that of the cash on hand and in the banks a part of it was Hans's personal cash, and the remainder belongs to the Alpine Dairy operation." (R. 2406)

To this offer counsel for appellee made the following objection:

"In the first place, our objection is that it is not proper rebuttal to the Government's case, and, secondly, it is my recollection of the evidence that Mr. Taylor did refer to a secret call to the bank. He didn't recall the party or name him, and then further, in cross-examination, these questions were propounded—about his secret call to the bank, the substance of it, and the cross-examination was about why it was secret, and along that line, as if there was some reason for the secrecy.

"Now, if I can propound an impeaching question and call a man who happens to be in the bank to answer the impeaching question, I don't see how that can be rebuttal to an issue." (R. 2408)

6. The trial court erred in rejecting the following offer of proof by appellant's rebuttal witness Vern Egenes:

"Mr. Taylor testified to the alteration of ten thousand dollars, or change of ten thousand dollars, he had charged to bonuses. He was examined in detail by his own counsel as to the fact that there were individuals or parties entitled to bonuses from various districts and including Snohomish County, as he testified.

> "We offer to prove by the witness on the stand, with reference to this Exhibit A-122, and the testimony of Taylor, that with reference to this ten thousand dollars that he used for accounts payable as charged to bonuses, the bonus—the total bonus was $2,139.55, and that the named parties—individuals—upon this exhibit are the only ones that were entitled to bonuses and the amount is specified to which each is entitled, and then Mr. Taylor thereby used up some $7,860.45, chargeable he says, to bonuses, and the cold record shows that such was not the fact; and as to Exhibit A-44, Mr. Taylor had testified in effect changes shown thereon were made by the witness on the stand, we propose to show by the witness on the stand that such changes were not made by Mr. Egeness and my position is again, as long as your Honor is ruling, in regards to Mr. Ellis, that this is highly prejudicial to the defense of Mr. Forster." (R. 2417-2418)

Counsel for defendant Taylor objected to the above offer on the following ground:

> "The entire matter is collateral, and concerns a corporation not named in the Indictment, and not a matter establishing the defense of Mr. Forster and not a matter that the Government is charging." (R. 2419-2420)

7. The trial court erred in refusing to grant appellant's motion to reopen the rebuttal testimony set forth in Assignments of Error 2 through 6 following the closing argument of counsel for the defendant Taylor (R. 2623-2626).

8. The trial court erred in overruling appellant's motion for a mistrial based upon charges contained in the

opening statement of counsel for defendant Taylor and directed against counsel for appellant (R. 93-95).

9. The trial court erred in failing to declare a mistrial at the close of the evidence based upon the prejudicial effect of charges brought by counsel for defendant Taylor against counsel for appellant which were wholly unsubstantiated by the proof.

10. The trial court erred in denying appellant's motion for acquittal and in the alternative for a new trial (R. 16-18).

ARGUMENT

Summary of Argument

1. At the special request of the jury one day after it had retired, the trial judge gave an additional instruction interpreting the word "willfully" as used in 26 U.S.C. 145(b) and the indictment based thereon. The additional instruction given was derived from *U. S. v. Murdock, infra,* a misdemeanor case decided under the predecessor to 26 U.S.C. 145 (a), and was given to the jury in such a manner as to establish a separate, alternate and erroneous standard of willfulness under Sec. 145(b), independent of the original instructions. The standard of willfulness in a felony case under Sec. 145(b) has been differentiated from the standard in a misdemeanor case under Sec. 145(a) by the Supreme Court in *Spies v. United States, infra.* Therefore, the additional instruction was erroneous, as this court held on both hearings of *Bloch v. United States, infra.* Since the giving of an erroneous instruction at the special request of the jury requires reversal, *Bollenbach v. U. S., infra,* the judgment below should be reversed.

2. Appellant offered the testimony of the witnesses Strack, Donaldson, Ellis and Egenes to rebut certain testimony given by the co-defendant Taylor when he was cross-examined by counsel for appellant. This offered rebuttal testimony was excluded on the ground that it concerned collateral matters raised on cross-examination. Appellant contends the issues he sought to rebut by this offered testimony were not collateral, but were fundamental to appellant's defense and admissible under the accepted rules of evidence. When counsel for Taylor argued to the jury that Taylor stood uncontradicted on the matters which appellant had sought to rebut, appellant moved to re-offer this rebuttal testimony, again contending that it was not collateral, and the testimony was again excluded. This exclusion of material, relevant and admissible testimony constitutes reversible error.

3. In his opening statement, counsel for the co-defendant Taylor charged a conspiracy by appellant's chief counsel, Kachlein, to make Taylor the scapegoat of appellant's tax deficiencies. Appellant moved for a mistrial before evidence was heard, contending that the charges and evidence outlined therein were irrelevant, incompetent and immaterial to any issue in the case, wholly prejudicial to appellant and the source of complete confusion of the issues. The motion was denied. No evidence offered by Taylor in any way substantiated the charges made and in fact the evidence conclusively showed the charges were baseless. The trial court was therefore under a duty to declare a mistrial at the conclusion of the evidence and, failing that, on appellant's motion for a new trial, because of the misconduct of

counsel for Taylor in injecting this false and prejudicial issue into the case. The failure of the trial court to declare a mistrial, either on appellant's motions or on the court's own motion, constitutes reversible error.

I. The Trial Court's Additional Instruction on Willfulness Was Erroneous

A. The additional instruction and the circumstances under which it was given

The trial judge instructed the jury on May 13, 1954. Those portions of the charge relating to the elements of the crime involved, intent and willfulness, are set forth in the margin.[1]

---

[1] "The essential elements of the crime or offense charged in each count of the Indictment are three:

(1) That there was owing to the Government more income tax than that shown in the return of the taxpayer for the particular taxable year in the applicable count of the Indictment;

(2) That the particular defendant knew that there was owing more income tax than that shown in the income tax returns; and

(3) That the particular defendant willfully attempted to evade or defeat part of such tax by filing or causing to be filed a false return. (R. 2655)

* * * * * * * *

"Those last two elements are the most important elements for your determination in this case and many of the following instructions will be devoted to clarifying to the best of my ability what the willfulness and knowledge as required in this case is or must be. (R. 2657)

* * * * * * * *

"The gist of the offense charged in the Indictment is willful attempt to evade or defeat the income tax imposed by the income tax law. The word 'attempt' as used in this law involves two elements:

The jury commenced its deliberations on the afternoon of May 13, 1954. The court was reconvened with the jury present at 11:35 a.m. on May 14, 1954, the judge having received the following request from the jury (R. 2674):

"The Jury wishes an interpretation of the word

---

(1) an intent to evade or defeat the tax, and

(2) some act done in furtherance of such intent.

The word 'attempt' contemplates that a defendant had knowledge and understanding that during the calendar years 1945 to 1949, inclusive, Hans Forster, or in the case of Counts VI to IX, inclusive, the Issaquah Creamery Company during the years of 1946 to 1949, inclusive, had an income in such years which was taxable and which was required by law to be reported and that such defendant attempted to evade and defeat the tax thereon, or a portion thereof, by purposely causing the respective returns to exclude income which such defendants knew Hans Forster or Issaquah Creamery Company had received during the years in question, and which such defendants knew should be included in such returns.

"With respect to the offenses charged there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

"A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonable expect to result from any act which is knowingly done.

"With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Now, specific intent, as the term suggests, means more than a mere general intent to commit the act.

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the

'willfully' as used in the indictment. Harold F. Craft."

Thereupon the following proceedings took place:

"THE COURT: Ladies and Gentlemen of the Jury:

"In an effort to meet that request of yours the Court is going to first give you again the instruc-

---

law requires, purposely intending to violate the law or recklessly disregarding the law, acts with specific intent." (R. 2657-2659)

*   *   *   *   *   *   *   *

"You will note that the acts charged in the Indictment are alleged to have been done 'willfully and knowingly.'

"An act is done 'willfully' if done voluntarily and purposely and with a specific intent to do that which the law forbids.

" 'Willfulness' implies bad faith and an evil motive.

"An act is done 'knowingly' if done voluntarily and purposely and not because of mistake, inadvertence or some other innocent reason." (R. 2660)

*   *   *   *   *   *   *   *

"The signing of an income tax return by a taxpayer makes it his return and if it is false and the taxpayer knows it to be false, he violates the law if he files it willfully and with an intent to evade the payment of his tax." (R. 2661)

*   *   *   *   *   *   *   *

"Section 145(b) of the Internal Revenue Code punishes a willful attempt to evade and defeat taxes in any manner and so you may find that conduct such as keeping false books, making false entries in the books, failing to make entries in books, altering invoices or other records, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records and any conduct the likelihood of which would be to mislead or conceal as constituting an attempt to evade and defeat taxes." (R. 2666)

*   *   *   *   *   *   *   *

tion I gave you yesterday as to willfully and another instruction that is related to it. I will supplement that with a little further statement which I think in essence is the same but probably stated differently. That is, with different words.

"Now I will give you the instruction as I gave it yesterday.

"You will note that the acts charged in the Indictment are alleged to have been done 'willfully and knowingly.'

"An act is done 'willfully' if done voluntarily and purposely and with a specific intent to do that which the law forbids. 'Willfullness' implies bad faith and an evil motive.

"An act is done 'knowingly' if done voluntarily and purposely and not because of mistake, inadvertence, or other innocent reason.

"Now, you will note I referred to specific intent and, therefore, will now read that to you again so that you will have that in mind.

"With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Specific intent, as the term suggests, means more than a mere general intent to commit the act.

"A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires, purposely intending to violate the law or recklessly disregarding the law, acts with specific intent.

"Now, to supplement that, as I say again, I am going to give you, in substance, the same matter.

"When used in a criminal statute—that is, the word 'willful' or 'willfully'—when used in a crimi-

nal statute it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely.

"The word is also characterized-employed to characterize a thing done without ground for believing it lawful, or conduct marked by reckless disregard whether or not one has the right so to act.

"That, I believe, Ladies and Gentlemen, covers the request as you have made it; and so, with that further instruction, you may now be excused and return and continue your deliberations." (R. 2674-2675)

Thus, it will be seen that the additional instruction, to which appellant duly excepted,[2] was given under extraordinary circumstances. In accordance with the procedure of the trial court, the jury was not furnished with a written copy of the instructions. The additional instruction was given after the jury had deliberated approximately a full day. During that period it is obvious that the jury was unable to reach any decision.

The entire record makes it clear that appellant at no time denied the existence of large deficiencies in the

---

[2] "I feel obligated—on behalf of the Defendant Forster to except to the use of each and every word in the new instruction just given by the Court and particularly that portion of it dealing with 'reckless disregard.'

"The instruction does not cover the use of 'good faith,' 'mistake' and rather stultifies the definition given the jury originally on willfulness which, except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

payment of tax. This was conceded from the start. Appellant vigorously insisted that he had at all times made a complete disclosure of all his books and records to Government agents and had provided large scale accounting assistance to the Government in order to determine the extent of the deficiencies, which he was ready and willing to pay. Appellant's defense was a complete denial of the element of willfulness or any intent to evade tax or defraud the revenue.

That the jury correctly apprehended the nature of this defense is made vividly clear by their request for additional instruction on the meaning of "willfully." The jury correctly understood that this was the crux of the case and that upon the issue of willfulness the guilt or innocence of the defendants, including appellant, must be determined. The additional instruction given by the court must, therefore, be viewed as the determining and decisive factor in this case.

In this respect, this case differs clearly from any of the cases hereinafter cited. The issue here cannot be whether the instructions, taken as a whole, were correct. The instructions were not taken as a whole; to the contrary, the specific point fundamental to its decision was raised by the jury and after the court had given its additional erroneous instruction, the jury returned its verdict of guilty as to appellant. That verdict was rendered at 9:15 p.m. of the same day on which the additional instruction had been given.

B. This court, in the *Bloch* case, declared the additional instruction on willfulness to be erroneous

In *Bloch v. United States* (C.A. 9, 1955) 221 F.(2d)

786, 789, 790, the trial court gave the following instruction:

> "Willfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*
>
> "*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.*"

This court declared the italicized portion of the above instruction to be erroneous.[3]

A comparison of the version of the *Murdock* instruction used in the *Bloch* case and the version used in the instant case shows that the instruction with which we are concerned is even weaker and more open to attack than that which was declared as error in the *Bloch* case. The vital difference is that in the *Bloch* case, the trial court, introductory to its definition, restricted the definition to " . . . the statute, which makes a willful attempt to evade taxes a crime . . . " and tells the jury that the word " . . . refers to the state of mind *in which the act of evasion was done*" (Emphasis supplied).

The trial judge in the instant case merely defined the

---

[3] This instruction was taken from the language of the United States Supreme Court in *U. S. v. Murdock,* 290 U.S. 389, 394, a case involving a misdemeanor and not a felony statute. That case is fully discussed, *infra* 25; and for purposes of convenience, this instruction will be referred to as the "*Murdock* instruction."

word willfully "when used in a criminal statute . . ." and emphasized that his definition was a general definition by repeating twice the words "when used in a criminal statute . . ." Thus, the trial judge did not even purport to tie his definition to the tax evasion statute under which the indictment was brought.

But even after the statement in the *Bloch* case that the definition given applies to the statute which makes a willful attempt to evade taxes a crime and refers to a state of mind in which the act of evasion was done, this court found the *Bloch* instruction erroneous. Why?

The court noted that the *Murdock* case was one in which the defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Sec. 1114 (a) of the Revenue Act of 1926, and Sec. 146(a) of the Revenue Act of 1928. This court found that the *Murdock* case

> " . . . does not apply the definition 'willfully' used by the trial court in the instant Section 145(b) case."

This court went on to say:

> "In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do

constitute in themselves the intent which is required under the section. See Hargrove v. U. S., * * *, wherein the Court discussed and distinguished the element of intent necessary under different statutes. See also U. S. v. Martell, * * *.

"These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case." (citations omitted)

The same *Bloch* case was again before this court upon petition for rehearing. 223 F.(2d) 297, 298 (C.A. 9, 1955). Here this court made clear the basis of its original decision when it said:

"The Government then suggests that since it concedes that a reversal of the appellant's conviction is proper, we should re-examine what we have to say upon the instruction concerning willfulness which we held was plain error and which constituted the basis of our judgment of reversal."

This court denied the petition for rehearing and stated:

"The instruction with which we are concerned goes to the intent, an essential element of the offense."

This court referred to other cases which will hereinafter be fully discussed. But it correctly concluded that those cases could not be controlling:

"But each case presents a problem by itself. We are not called upon here to express our views as to whether this obviously questionable language was or was not prejudicially erroneous when read in the context of all the other instructions given in the Bateman and the Legatos cases. All that we have held here is that the language of the court criticized was in and of itself erroneous, and in this

particular case its prejudicial effect was not cured by the other instructions given."

Appellant wholeheartedly concurs with the statement that each case presents a problem by itself. Appellant cannot too often emphasize that in this case we are dealing with a separate and additional instruction, given a day after the original charge and an instruction which was manifestly the determining factor in the decision of the jury.

Appellant submits that on the authority of the *Bloch* case, the judgment on the verdict in the instant case should be reversed because the language of the additional instruction in this case and circumstances under which the additional instruction was given were far more prejudicial.[4]

C. The *Murdock* case involved a misdemeanor statute

The court's additional instruction was undoubtedly inspired by the following language concerning the word "willfully" contained in *United States v. Murdock, supra*:

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . ; without justifiable excuse . . . ; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct

[4] The recent case of *Banks v. United States* (C.A. 8, 1955) 223 F.(2d) 884, 889, also makes clear that the basis of this court's decision in the *Bloch* case was "...on the count covering the subject of willfulness."

marked by careless disregard whether or not one has the right so to act, . . . " (Citations omitted)

The *Murdock* case involved Sec. 1114(a) of the Revenue Act of 1926 and Sec. 146(a) of the Act of 1928 which were identical and are set forth in the margin.[5]

The defendant in the *Murdock* case had been indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 income tax returns for moneys paid to others. It should be carefully noted that the statutes cited proscribed the willful failure to make a return and pay tax in addition to the failure to keep records and supply information.

Sec. 1114(a) of the Revenue Act of 1926 and Sec. 146(a) of the Revenue Act of 1928 are now embodied in 26 U.S.C. 145(a) as follows:

> "Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax

[5] "Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

> or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

It is clear that in the *Murdock* case the Supreme Court construed the predecessor to Sec. 145(a). But in the instant case, appellant was charged in nine counts with violation of Sec. 145(b) which states:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 145(a) relates to a misdemeanor; Sec. 145(b) relates to a felony, as is specifically stated therein. And the punishment provisions of the felony statute are accordingly far more severe than those of the misdemeanor statute.

The question then becomes — may the standard of willfulness applicable to Sec. 145(a) and its predecessor be applied to the felony statute, Sec. 145(b)?

D. The Supreme Court has distinguished between the misdemeanor and felony statutes

The essence of *Spies v. United States,* 317 U.S. 492, 497-499, was the difference between the felony and misdemeanor statutes; and in the same case the Supreme Court clearly laid down the requirements of willfulness under the felony statute.

Defendant in that case was indicted and convicted under Sec. 145(b). The Government contended that a willful failure to file a return and a willful failure to pay tax, without more, constituted an attempt to defeat or evade under Sec. 145(b). This theory was embodied in the trial court's instructions contrary to the claims of defendant that such proof would only establish two misdemeanors under Sec. 145(a). The Supreme Court, finding the instructions as to the elements of the crime erroneous, reversed the decision of the Court of Appeals which had affirmed the trial court. The discussion by the Supreme Court is lengthy but wholly pertinent to the definition of willfulness under Sec. 145(b) and especially to the issue of whether the word was of equal application in the misdemeanor and felony statutes:

> "Willful failure to pay the tax when due is punishable as a misdemeanor. Section 145 (a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. Section 145(b). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor.
>
> "A felony may, and frequently does, include lesser offenses in combination either with each other

or with the other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in §145(b) meant no more than the same derelictions it had just defined in §145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context.* United States v. Murdock, 290 U.S. 389, * * *. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

"Had §145 (a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of §145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor we think argues strongly against such an interpretation.

"The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeeds in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. *We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute*

the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (Emphasis supplied)

At the outset we notice at once the statement of the court that "willful" is a word of many meanings, its construction often being influenced by its context. We must, therefore, consider its context in the *Murdock* case and that context was the misdemeanor statute.

The Supreme Court then goes on to discuss the concept of willfulness under the felony statute. It states that Sec. 145(b) requries "some willful commission in addition to the willful omissions that make up the list

of misdemeanors." What is needed is a "willful and positive attempt to evade tax in any manner, or to defeat it by any means."

The difference is clear. The misdemeanor statute relates to acts of omission; the felony statute relates to positive, affirmative acts of commission. Stubbornness, perverseness, obstinacy, a reckless disregard of whether one has the right so to act may all give rise to willful omissions. They may result in a failure to keep records, supply information, file a return or pay tax.

But stubbornness, perverseness and obstinacy can never be the positive, affirmative acts of commission required by the felony statute; nor can the doing of a thing without ground for believing it to be lawful or conduct marked by a reckless disregard whether or not one has the right so to act. All of these standards lack the vital element of an affirmative act knowingly performed to the end and with the purpose that tax will thereby be evaded or defeated.

In its original instructions, the trial court paraphrased the last quoted paragraph from the *Spies* case.[6] It outlined those willful acts which may constitute attempts to evade under Sec. 145(b). It was therefore,

---

[6] "Section 145(b) of the Internal Revenue Code punishes a willful attempt to evade and defeat taxes in any manner and so you may find that conduct such as keeping false books, making false entries in the books, altering invoices or other records, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records and any conduct the likelihood of which would be to mislead or conceal as constituting an attempt to evade and defeat taxes." (R. 2666)

especially erroneous for the trial court, in its additional instruction, to substitute for its previously given correct standard of willfulness, as derived from the *Spies* opinion, the weaker and erroneous *Murdock* instruction derived from the misdemeanor case.

In repeating its original instructions on "willfully," "knowingly," and "specific intent" prior to giving the *Murdock* instruction as an additional instruction, the trial court compounded its error. For it told the jury that the *Murdock* instruction was "in substance, the same matter" as its previous instructions on "willfully," "knowingly" and "specific intent." It was not. It was a lower standard, applicable to a lesser crime. And this was in direct response to the jury's request for "an interpretation of the word willfully as used *in the indictment.*"

In effect, the trial court gave to the jury an *alternate* standard which the jury might employ — a standard lower than it had previously given. The *Murdock* instruction here was not a part of a whole, as it was in *Bateman v. United States, infra; Berkovitz v. United States, infra; Legatos v. United States, infra,* and *Banks v. United States, infra.* It was here presented to the jury as an alternate and separate standard by which they might determine the only real issue in the case. Using that standard, the jury brought in its verdict of guilty as to appellant. There is not in any part of the trial court's additional instruction a remote suggestion of the Supreme Court's unmistakable meaning when in the *Spies* case it describes the meaning of willfulness under Sec. 145(b).[7]

[7] The "admirable clarity and correctness" of the *Spies*

E. Willfulness under Sec. 145(b) must comprehend a specific wrongful intent to evade a known tax obligation

The courts have for many years applied plain and straightforward definitions of the meaning of "willfulness" in the crime of tax evasion. Thus, in *Hargrove v. United States* (C.A. 5, 1933) 67 F.(2d) 820, 823, the trial court had erroneously charged that a man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law, he has violated the law. Of this the court said:

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. . . . Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." (Citations omitted)

The meaning and nature of willfullness are again made clear in *United States v. Martell* (C.A. 3, 1952) 199 F.(2d) 670, 672:

---

case are approved in *Jones v. United States* (C.A. 5, 1947) 164 F.(2d) 398, and most recently in *United States v. Bardin* (C.A. 7, 1955) 224 F.(2d) 255. It is interesting to note that none of the other cases cited in this section which discuss the correctness of the *Murdock* instruction consider it in the light of the requirements of the *Spies* case.

> "Willfulness is an essential element of the crime proscribed by §145(b). It is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is supported by the evidence and explained to the jury."

Another example of a correct instruction is found in *Haigler v. United States* (C.A. 10, 1949) 172 F.(2d) 986, 989, as follows:

> "The jury was instructed that willful intent was an essential element of the proof of the crime charged, and that in order to justify a verdict of guilty, it was necessary to prove, not only that a false return had been filed, but that the appellant caused the return to be made with knowledge that it was fraudulent, and with the willful intention of evading his obligation under the statute."

The portion of the charge on willfulness in *Gaunt v. United States* (C.A. 1, 1950) 184 F.(2d) 284, 291, is set forth in the margin.[8] Here willfully was defined di-

---

[8] " 'Willfully' means knowingly, and with a bad heart and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is

rectly within the framework of a "purpose to cheat or defraud or do a wrong in connection with a tax matter." And the jury was instructed that it is not enough that the defendant be stubborn or stupid or even grossly negligent. Compare this with the trial court's additional instruction that willfully may mean to act stubbornly, obstinately, perversely or conduct marked by a reckless disregard of whether or not the defendant had the right so to act. The very protections accorded in the *Gaunt* instruction are those which are destroyed by the instruction under question.

The applicable portion of the charge in the recent case of *Gariepy v. United States* (C.A. 6, 1955) 220 F. (2d) 252, 260-261[9] makes it unmistakably clear that the

---

not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to the regulations laid down by the Bureau of Internal Revenue and the United States Department of the Treasury. He certainly is not willful if he acts without the advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an accountant."

---

[9] " . . . but you cannot find the defendant Gariepy guilty unless you find beyond a reasonable doubt that he had knowledge that he received more money than that reported and willfully attempted to defeat and evade the tax imposed thereon in the manner charged in the indictment . . . It must be proved that the defendant acted not only knowingly, as I said above, but that he he has acted willfully in an attempt to evade and defeat a particular tax charged or a portion of it. . . . Willfulness is an essential element of the crime charged. Willfulness is the state of mind of the defendant where he is fully aware of the existence of a tax imposed upon him by the law which he seeks to

element of willfulness is directly and intimately related to and in fact consists of the state of mind of the defendant when he is fully aware of the tax obligation and wrongfully seeks to evade or defeat it.

Each of these cases makes it clear that the essence of willfulness under Sec. 145(b) may be clearly and simply stated. It is the specific wrongful intent to defeat or evade a known tax obligation. This is the specific element which the trial court completely omitted to mention in its *additional* instruction to the jury. The additional instruction is couched throughout in general language which never once speaks of the knowledge of tax obligations and the specific intent to evade them. And the final criterion given to the jury in response to its direct request was the standard declared erroneous in the *Bloch* case.

F. The instant case may be distinguished upon the instruction given from all other cases in which a similar instruction on willfulness was given

Convictions have been affirmed in cases in which the instruction on willfulness appears deceptively similar to the additional instruction in the instant case. In no event should it be forgotten that the additional instruction in the instant case was given separately at the

---

evade or defeat. Willful evasion requires an intentional act or omission as compared to an accidental or inadvertent. It requires a specific wrongful intent to defeat or evade the tax obligation known to exist. . . . There can be no crime without a criminal intent, as the court has just now instructed you, and in this case, the specific intent is necessary to constitute the crime under the charge made in the indictment."

specific request of the jury a day after the initial charge.

But it is appellant's purpose to point out clearly and fully that in none of the cases of affirmance was the situation comparable to our own, and that the charge in those cases contained safeguards wholly lacking in the case here under determination.

We must also keep in mind that certain cases have dealt with the issue of presumption of guilt and the instruction appropriate thereto. The *Bloch* cases was such a case; but error was predicated independently on the willfulness instruction. In this case, appellant directs the court's attention wholly to the issue of willfulness.

Much has been made, in the subsequent discussion of the *Bloch* case, of the case of *Bateman v. United States* (C.A. 9, 1954) 212 F.(2d) 61, 70. For that reason, the instruction of the court on willfulness as shown by the reported decision is set forth in the margin.[10]

---

[10]"In order to secure conviction, it is necessary to prove that the conduct of the defendants was willful. The mere fact that the tax returns in question were made by another, is no defense. If, on the other hand, you believe that the defendants Wallace Bateman and Charles Bateman did not act willfully, but mistakenly, and errors, if any, were caused by the tax consultant or other person preparing the returns and there was no willful intent on the part of Wallace Bateman or Charles Bateman to evade taxes, but that their signing of the returns resulted from inadvertence and mistake, then it is your duty to acquit the defendants or either of them. . . .

"However, even gross carelessness, recklessness or negligence in the preparation of an income tax return or honest errors of fact or of law, is not fraud, and

The following is a further portion of the charge relating to willfulness:

> "You will observe that one of the elements of the offense as charged is that the defendants willfully attempted to evade or defeat payment of their just tax. Willful attempt means an intentional one, done with bad purpose or evil motive, and it is therefore necessary that the Government prove that in filing their income tax returns, the defendants thereby, with such purpose or motive, intended to evade or defeat the payment of some portion of their income tax."

The charge as reported does not include all of the equivocal elements of the *Murdock* instruction. All of the portions of the charge in the *Bateman* case here

---

before the jury can infer the existence of fraud in this case, they must find beyond a reasonable doubt from the evidence that either or both of the defendants willfully, with intent to evade their Federal income taxes, prepared or caused to be prepared a materially false income tax return reporting income of the defendants covering either or both of the tax years 1945 or 1946. . . .

"If you find from the evidence that these defendants sought advice and counsel with respect to their income tax liability for the years 1945 and 1946 from one whom they thought would properly and correctly prepare their income tax returns, and if you further find that the defendants honestly attempted to provide their tax consultant and advisor with all information reasonably necessary to enable the consultant to prepare correct income tax returns, and that the taxpayers when they signed the same, presumed they were true and correct, then your verdict should be not guilty, for there would be absent the element of knowing and willful intent to evade or to attempt to evade payment of income taxes, even though it now develops that said income tax returns were materially wrong."

cited specifically relate the element of willfulness to the crime charged and not to any general proposition of criminal law. Again and again it is made plain in the charge that the willfulness is related to an intent to evade or defeat the payment of income tax. There is no talk of stubbornness, obstinacy or perversity; and the instruction makes it clear that "even gross carelessness, recklessness or negligence in the preparation or relating to the preparation of an income tax return" does not constitute the crime of tax fraud—contrary to the additional instruction in the instant case.

Like the *Bateman* case, *Berkovitz v. United States* (C.A. 5, 1954) 213 F.(2d) 468, 473, concerned itself mostly with the question of the presumption of guilt arising from the filing of a false or incorrect return. The charge contained language somewhat similar to that contained in the trial court's additional instruction.[11] It will be noted that the similar language in the

---

[11] "Now the word 'wilfully' in the sense used here, denotes often, intentional, knowing, or voluntary, as distinguished from an accidental act, and also employed to characterize the thing done without grounds for believing it lawful or conduct marked by careless disregard of whether one has the right so to act, but, when used in a criminal statute, gentlemen, generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely.

* * * * * * * *

"The attempt to defeat and evade the tax must be a wilfull attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilfull, that is, intentionally done, with the intent that the government should be defrauded of the income tax due from the defendant."

Berkovitz case was followed by an unmistakably clear instruction that the element of willfulness is inextricably intertwined with the specific intent to evade a known tax obligation.

We may now consider the most recent decision of this court upon this problem. *Legatos v. United States* (C.A. 9, 1955) 222 F.(2d) 678, 687, 688. Here, once more, the question of willfulness is allied to the question of presumption of guilt; and the basic contention upon this appeal was that there was an erroneous instruction on the matter of presumption in the light of *Morissette v. United States,* 342 U.S. 246, and *Wardlaw v. United States* (C.A. 5, 1953) 203 F.(2d) 884. Since, however, the instructions included a definition of willfulness similar to the additional instruction in this case, it is necessary to consider the whole portion of the charge relating to intent, knowledge and willfulness.[12]

---

[12] "Intent is an essential element in the perpetration of the offenses charged against the defendants in the indictment. Intent may be shown by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred. In determining whether a defendant had such intent, you should take into consideration all the facts and circumstances in evidence, the acts and conduct of such defendant, and his motives, if any, disclosed by the testimony, for doing or not doing the act or acts charged in the indictment as shown by the evidence; and if from all the facts and circumstances in the evidence there is no other reasonable conclusion than that he is guilty, you should so find.

"One of the essential elements of the proof of attempt to evade income tax or the payment thereof is knowledge on the part of the taxpayer of the existence of the obligation; that is, of the tax due and a specific wrongful intent to evade the payment thereof. If you

The difference must now be clear. The *Murdock* language used in the *Legatos* case was not given as an isolated instruction, much less as the philosopher's stone by which the jury might determine the ultimate issue

---

find from all the evidence that the defendant Legatos did not have actual knowledge of the existence of an obligation on his part to pay any income tax in addition to the income tax reported by him in his original income tax returns, and that said defendant did not have a specific wrongful intent to evade such obligation, then you should find the defendant Legatos not guilty.

"Fraud is an actual intentional wrongdoing and the intent required is a specific mental determination or purpose to evade a tax known or believed to be owing. Before you can convict the defendant Legatos, you must find from the evidence beyond a reasonable doubt that any income tax return involved in this indictment was not only false and fraudulent, but that by such false and fraudulent return said defendant committed an actual, intentional wrong-doing and that the filing of said return was with the intent on his part to evade a tax owing or believed to be owing to the United States.

"The word 'wilfull' when used in a criminal statute, generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act.

"The word 'wilfully,' as used in this statute, means more then [sic] intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation would, if believed by the jury, justify a verdict for a defendant. It is for the jury to say whether a defendant had the requisite criminal intent that is whether he willfully and knowingly attempted to defeat and evade the income tax."

which plagued them. The *Murdock* language there is sandwiched between all manner of protective language, making it clear at all times that the willfulness involved is the willful evasion of a known tax obligation. Thus, the charge by way of introduction to this concept says:

> "One of the essential elements of the proof of attempt to evade income tax or the payment thereof is knowledge on the part of the taxpayer of the existence of the obligation; that is, of the tax due and a specific wrongful attempt to evade the payment thereof."

Again the court reverts to the theme that it must be shown that the income tax return involved was not only false and fraudulent, but that by the false and fraudulent return the defendant committed an actual and intentional wrongdoing, and that the filing of the return was with the intent on his part to evade a tax owing or believed to be owing to the United States. Then comes the language of the *Murdock* instruction which in this case is auxiliary to what has been said before and to what is said after—that the jury must ultimately determinte whether Legatos willfully and knowingly attempted to defeat and evade a known tax obligation.

The *Legatos* case must be read in the light of the warning contained in this court's decision on the petition for rehearing in the *Bloch* case — that each case presents a problem by itself. Appellant submits that regardless of the use of the *Murdock* language in the *Legatos* case, the jury was there fully and clearly instructed on the issue of willfulness.

The most recent case[13] involving the *Murdock* in-

[13] In *Herzog v. United States* (C.A. 9, 1955) 226 F.(2d)

struction is *Banks v. United States* (C.A. 8, 1955) 223 F.(2d) 884, 889. While the *Murdock* language was there used, the court makes it plain that the specific application of this language was not omitted, for the court there charged the jury:

> "The element of intent enters into the effenses charged in the indictment and is one of the questions for you to consider and decide. That is, whether the defendant willfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947."

G. The giving of the *Murdock* instruction as a separate instruction at the special request of the jury created incurable error

Appellant has already urged that the language of the *Murdock* instruction is erroneous when applied to Sec. 145(b), and that in any event this case should be decided on the authority of the *Bloch* case. A review of the other cases in which a similar problem has arisen shows that in each of those cases the jury were fully and adequately instructed on the subject of willfulness.

But even if error in the use of the *Murdock* instruc-

561, decided October 11, 1955, this court did not consider the merits of the *Murdock* instruction, or to use this court's own words "whether the instruction is slightly tainted with error or seriously tainted." Taint is conceded. The *Herzog* holding overrules the procedural aspect only of the *Bloch* case; it holds that the appellate court may not notice error in instructions under Federal Rule of Criminal Procedure 52(b) where Federal Rule of Criminal Procedure 30 has not been observed.

tion may be cured by considering all of the instructions in context and determining whether on the whole the jury were fully informed as to the meaning and necessity of willfulness in the felony of tax evasion, such a rule cannot be applied to this case where the erroneous instruction was given in response to the special request of the jury.

Such is the holding in *Bollenbach v. United States,* 326 U.S. 607, 611-612, 613, 615.

There the trial had lasted seven days and the jury, having deliberated for seven hours, returned to the court for an additional instruction. The additional instruction proved to be erroneous.

The Supreme Court reversed the affirmance by the Court of Appeals of the trial court's judgment of guilty upon the verdict. The court laid special emphasis upon the jury's request for an additional instruction:

> "But precisely because it was a last-minute instruction the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' Quercia v. United States, 289 U.S. 466, 469. * * * 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, * * * and jurors are ever watchful of the words that fall from him. *Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific*

> *ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.*" (Emphasis supplied.)

The court went on to emphasize again the responsibility of the trial court in this special situation:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away *with concrete accuracy*." (Emphasis supplied.)

It is under this holding that the erroneous effect of the additional instruction becomes plain. Faced with the special request of the jury for further enlightenment upon the single vital issue of the case, the judge was under a duty to reply "with concrete accuracy." The trial court's additional instruction was not simply "misleading." It was "plain error" and so this court held upon both hearings of the *Bloch* case.[14]

---

[14]The *Bollenbach* case has subsequently met with widespread judicial approval. For the proposition that "a conviction ought not to rest upon an equivocal direction to the jury on a basic issue," see *M. Kraus & Bros. v. United States,* 327 U.S. 614; and the concurring opinion of Mr. Justice Frankfurter in *Estep v. United States,* 327 U.S. 114. See also, for the same proposition and citing and approving the *Bollenbach* decision the following: *McFarland v. United States* (C.A.D.C. 1949) 174 F.(2d) 538; *United States v. Levi* (C.A. 7, 1949) 177 F.(2d) 827; *United States v. Donnelly* (C.A. 7, 1950) 179 F.(2d) 227; *Kitchen v. United States* (C.A.D.C., 1953) 205 F.(2d) 720; *Hamilton v. United States* (C.A. 5, 1955) 221 F.(2d) 611. Although convictions were reversed in these cases

H. Summary

To summarize his contentions, appellant submits that the *Murdock* instruction is derived from a misdemeanor case; that the *Spies* case has made it clear that the standard of willfulness in a misdemeanor case may not be applied to a felony case. Appellant further submits that the language of the *Murdock* case has twice been found to be erroneous by this court in the *Bloch* case.

While the use of the *Murdock* language may be non-prejudicial as a part of a charge which as a whole correctly sets forth the elements of willfulness under Sec. 145(b), such circumstances are not before the court in this case. Here the erroneous instruction was given separately, one day after the initial charge as an alternate and separate standard, and in response to the specific request of the jury for a further definition of the word "willfully."

Under the circumstances, it was the duty of the trial judge to be "concretely correct" since, as Mr. Justice Frankfurter observed in the *Bollenbach* case, the jury were bound to be most impressed by the judge's last words of instruction. The trial judge was not "concretely correct." He gave an additional instruction which this court has found erroneous and on that basis the jury brought in its verdict of guilty as to appellant.

Upon the authority of the *Bollenbach* case, the trial

---

because of equivocal instructions upon basic issues, in none of them was there involved an *additional* instruction to the jury which proved to be erroneous as in the *Bollenbach* case and the instant case. It should be noted that the *Bollenbach* holding was specifically approved by this court on the rehearing of the *Bloch* case.

court's error was unquestionably prejudicial. As Mr. Justice Frankfurter stated in the court's opinion:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing into presuming all errors to be 'harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

II. The Trial Court Erroneously Excluded Appellant's Offered Rebuttal Testimony

A. The significance of the rebuttal testimony

In this lengthy trial which commenced on January 31, 1954, and concluded on May 14, 1954, each of the three defendants presented his separate case. Appellant's defense was the first defense case heard. Appellant admitted the existence of large tax liabilities, denied any intent to evade taxes and asserted that since all matters of accounting were under the supervision of the defendant Taylor, who prepared all of the tax returns in question, the responsibility for error lay with Taylor. It is important to note that the defense of appellant was not necessarily predicated upon any criminal intent or action on the part of Taylor; it also went to show Taylor's incompetence, want of skill and

knowledge and negligence as the chief factors in the development of the serious understatements of tax.[15]

It was in the nature of things that the defendant Taylor's case, which came after that of appellant, gave Taylor the opportunity not only to submit his own case, but also to rebut the testimony given by witnesses for appellant. The case of the defendant Erickson was presented last. In his own case, therefore, Taylor was able to attempt to explain many vital transactions according to his own light and in contradiction to the explanations submitted by appellant. Thus, it became vitally necessary for appellant to have the opportunity properly to rebut Taylor's testimony. This phase of the appeal deals with the trial court's rejection of appellant's offered rebuttal testimony. Appellant will herein review in detail the offered testimony and show its connection with the principal issues involved in this case—matters of vital importance on issues which can in no way be denominated as collateral, although this was the trial court's basis for exclusion.

The offered rebuttal testimony went to the following issues:

(1) Was it proper for Taylor to submit to different persons financial statements for the same enterprise as of the same date which differed in material particulars, as Taylor admittedly did? Taylor testified that this was a proper and accepted practice. Appellant's offer of rebuttal testimony that it was not went directly to the skill, competence and honesty of Taylor, all of

[15]Almost the whole of the testimony of the appellant's witness Gorans, a certified public accountant, went to this point (R. 422-829).

which were matters essential both to the prosecution and to the defense case of appellant.

(2) What is the meaning of "cash on hand and in banks" in a financial statement? Taylor testified that this could include accounts receivable. The offered rebuttal testimony, as will be shown, went directly to the issue of Taylor's knowledge of appellant's affairs. Appellant's defense was that Taylor had full knowledge and full responsibility; Taylor's defense was that he had limited knowledge and limited responsibility.

(3) Did the defendant Taylor in a conference with a bank officer admit to knowledge of certain bank accounts of appellant and their amounts? Appellant offered rebuttal testimony to show such knowledge, going to the heart of the contentions already set forth.

(4) Did the witness Egenes make certain alterations in the books of Finstad & Utgard? Taylor testified in his case that he did. Appellant offered the testimony of Egenes in rebuttal. Alterations in the books of the appellant's various enterprises were a key issue in this case, going directly to the responsibility of the various defendants.

(5) What was the proper amount of bonus payments to milk shippers at Finstad & Utgard for the year 1947? Taylor testified that the alteration by Egenes of the Finstad & Utgard books arose out of bonus payments in an amount equal to the alteration. Appellant offered the rebuttal testimony of Egenes to show that the actual bonus payments during that year were less than 25% of the alteration. This testimony went directly to the proof of Taylor's responsibility for the alterations. It involved not only Taylor's skill as an accountant, but his character.

These are issues upon which appellant's proposed rebuttal testimony was rejected by the trial court.

B. Appellant was entitled to rebut the case propounded by the defendant Taylor

The prosecution case generally went to show the facts which had resulted in tax understatements. The defendants presented different versions as to the responsibility for these facts. When Taylor's explanation conflicted directly with that of appellant, appellant was entitled to rebut the Taylor case even though these matters may not have gone directly to rebut the prosecution case.

The principle is made clear by Wigmore. He states in Wigmore on Evidence, 3rd Ed., §916(3):

> "Where a *co-defendant in a criminal prosecution* testifies for himself, the other co-defendant may impeach him, because their interests, as between each other, are distinct, and because the witness has been called by himself and not by the impeacher; and the same consequence follows for witnesses called by one co-defendant." (Italics the author's.)

The impeachment may consist of cross-examination[16] or contradiction. The trial judge correctly permitted counsel for each defendant to cross-examine the other defendants and their witnesses. In a like manner, each defendant was correctly permitted to offer testimony in rebuttal of the case of the other defendants. The question before the court is limited to the proper scope of that rebuttal testimony.

---

[16]See Wigmore on Evidence, 3rd Ed. §916 (5).

C. Material matters elicited on cross-examination may always be rebutted

The trial court's exclusion of appellant's offered rebuttal testimony was based upon the theory that it related to collateral matters elicited on cross-examination and was therefore not properly rebuttable. The question is not so much of law as of the application of the law to the specific facts of this case.

The basic rule is laid down by Wigmore that the testimony of a witness may not be contradicted on collateral matters. Wigmore on Evidence, 3rd Ed., §1001. He realizes that the difficulty lies in the definition of the word "collateral" which is "a mere epithet, not a legal test."[17] He therefore adopts the rule laid down in *Attorney General v. Hitchcock,* 1 Exch. 104, as follows:

> "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?"

The adoption of this test leads to the conclusion that there are two classes of facts of which evidence would have been admissible independently of the contradiction: (1) facts relevant to some issue of the case, and (2) facts relevant to the discrediting of the witness with respect to some specific testimonial quality such as bias, corruption, skill, knowledge or the like.[18]

The rule of *Attorney General v. Hitchcock, supra,* has been specifically adopted by this court. *Nye & Nissen v. United States* (C.A. 9, 1948) 168 F.(2d) 846, aff'd 336 U .S. 613. And more recently, in *Shanahan v.*

[17]Wigmore, op. cit. §1003.

[18]Wigmore, op. cit. §1004, §1005.

Southern Pacific Co. (C.A. 9, 1951) 188 F.(2d) 564, this court has approved of the Wigmore analysis.

Nye & Nissen v. United States, supra, cites and approves the opinion in *Ewing v. United States* (C.A.D.C., 1942) 135 F.(2d) 633, in which the whole matter of contradiction by rebuttal testimony is exhaustively discussed. This case also adopts the rule of *Attorney General v. Hitchcock, supra,* and holds that rebuttal testimony is admissible to contradict matters brought out on cross-examination if the rebuttal testimony directly relates to material issues of the case or to the testimonial qualifications of the cross-examined witness.

Ewing was a case of rape wherein a witness for the defendant was cross-examined as to statements in which she had allegedly conceded the guilt of the defendant. She denied having made such admissions. Her testimony was that she had been in the presence of the prosecutrix during the entire time in which the alleged attack took place and that it did not take place. The prosecution was permitted to rebut the denial of the defense witness that she had conceded defendant's guilt. The defense claimed that the cross-examination in question had been on a collateral matter. The court held that the matter elicited on cross-examination and the rebuttal thereof would go not only to the crucial issue in the case, but also the bias and credibility of the witness.[19]

---

[19]See also *United States v. Pincourt* (C.A. 3, 1946) 159 F.(2d) 917, where testimony elicited on the cross-examination of defendant was rebutted by a Government witness and the Circuit Court found that the record justified the district judge's characterization

Our inquiry, therefore, is to determine whether the testimony offered by appellant and rejected was independently admissible—whether it was relevant to some issue in the case or whether it was relevant to the testimonial qualifications of the cross-examined witness, the defendant Taylor.

D. Analysis of the rebuttal testimony which was offered and rejected

(1) *The testimony of Phillip A. Strack*

Mr. Strack was an officer of the Peoples National Bank of Washington with whom the appellant and Taylor had extensive dealings. He was offered as a rebuttal witness. The court sustained objections to the following two questions as improper rebuttal:

> (1) "Mr. Strack, as a bank officer will you accept and rely on a financial statement submitted by a borrower if you knew that the borrower had outstanding for the same date a different statement?" (R. 2398)
>
> (2) "Now, Mr. Strack, will you state on a financial statement what is meant by 'cash'?" (R. 2399-2400)

These questions arose out of testimony elicited on the cross-examination by appellant's counsel of the defendant Taylor. On this cross-examination there were admitted defendant's Exhibit A-92 a financial state-

---

of the particular issue as "important." See also *United States v. Stoehr* (U.S. D.C., Pa., 1951) 100 F. Supp. 143, aff'd (C.A. 3, 1952) 196 F.(2d) 276, a tax case where the general rule is again laid down that testimony elicited on cross-examination with respect to a *collateral* matter may not be impeached.

ment of Issaquah Creamery Company (hereinafter called "Issaquah") for December 31, 1933, and defendant's Exhibit A-93, a financial statement of Issaquah for December 31, 1934, containing a comparative statement showing the state of the company's affairs on January 1, 1934, and December 31, 1934.

A comparison of the balance sheets for December 31, 1933, on A-92 and for January 1, 1934, on A-93 showed accounts receivable to be $20,444 on A-92 and $18,360.96 on A-93 (R. 1932-1933), accounts payable to be $25,-278.32 on A-92 and $9,546.55 on A-93 (R. 1940).

Defendant's Exhibit A-95 was a financial statement of Issaquah for December 31, 1935, containing a summary of operations for previous years. A-92 showed a profit for 1933 of $2,019.40. A-95 showed a profit for the same year of $12,697.27 (R. 1955). Both exhibits were prepared by Taylor and A-95 was submitted to The First National Bank of Stanwood (R. 1954).

The operations for the year 1934 resulted in a loss of $1.73 as shown by A-93. However, A-95, the statement given to The First National Bank of Stanwood, showed a profit for that year of $11,469.30 (R. 1956).

A-65 was a financial statement for Issaquah prepared by Taylor bearing the date December 31, 1935, exactly the same date as A-95. Taylor testified that this statement was delivered to The Peoples National Bank of Washington (R. 1957). Let us now compare various items as contained in these two statements for the same company for the same date delivered to two different banks:

Item	A-95	A-65
Sales	$480,472.26	$477,961.54
Cash on Hand	minus 6,213.74	2,187.03
Profit or Loss	13,732.75	minus 1,369.37
		(R. 1959-1961)

Defendant's Exhibit A-99 was a financial statement dated December 31, 1938, for Issaquah. Taylor testified that this statement was delivered to appellant (R. 1977). Defendant's Exhibit A-100 was a financial statement for Issaquah for the same date which Taylor testified he believed was delivered to the Issaquah State Bank (R. 1980). A summary of certain comparative items is shown in the margain.[20]

Thus, on the statement delivered to the Bank, A-100, Taylor increased the items for cash on hand, notes receivable, accounts receivable, inventory and equipment. He decreased items for milk accounts payable, notes payable and accounts payable. In the end, he arrived at a surplus shown on A-99 of $42,517.23 and on a A-100, the statement given to the Bank, of $64,695.02.

The net result of these statements is to make it clear

	A-99	A-100
[20]Cash on hand	$ 2,406.42	$ 4,797.66
Notes receivable	3,444.94	3,847.89
Accounts receivable	46,650.55	56,660.68
Inventory	15,169.43	16,891.83
Equipment	75,375.17	88,394.12
Milk account liability	11,188.17	9,616.53
Notes payable	12,729.29	4,825.90
Accounts payable	18,862.35	7,853.20
Surplus	42,517.23	64,695.03
		(R. 1979-1990)

that Taylor on various occasions gave statements to different parties covering the same enterprise as of the same date and displaying radically different figures. In the case of Exhibits A-95 and A-65, two banks received two completely different statements. In the case of A-99 and A-100, the Issaquah State Bank received a statement differing materially from that delivered by Taylor to appellant.

By this line of cross-examination appellant sought to show that Taylor was a practiced manipulator of financial statements. It nowhere appeared from the testimony that the appellant was familiar with these statements, that he was aware of the differences between the statements or that he in any way participated in the composition of them. This cross-examination went directly to Taylor's want of skill and competence as an accountant, which was the substance of appellant's defense. This cross-examination tended to show that the question was as much of Taylor's accounting ethics as of his professional skill.

How did Taylor explain these extraordinary variations? The substance of his testimony was that different people want to see different things in a financial statement, that he was within the bounds of good accounting procedure in making up all of the questioned statements. As to the loss of $1.73 shown in A-93 (which had never been submitted to a bank) and which had been converted into a tidy profit of $11,469.30 in A-95 which was delivered to the First National Bank of Stanwood, Taylor gave the ingenuous explanation that:

> "Mr. Forster was in a very difficult position financially. The bankers wanted to work with him.

> The bank examiners would not accept minus figures." (R. 1958)

Taylor's conception of fundamental accounting practice is illustrated by another statement made with regard to the differences between A-65, the statement delivered to the Peoples National Bank and A-95, the statement delivered to the First National Bank of Stanwood. Of those he stated:

> "Mr. Griffin, when any balance sheet balances your figures are never incorrect in that balance sheet. You may adjust them, suitable figures to suit certain occasions—." (R. 1960)

The matter is made even more clear by Taylor's further explanation:

> "They were two distinct statements for a purpose." (R. 1961)
>
> "Q. Was one purpose to be able to show that Isaaquah Creamery Company was operating at a loss for the purpose of borrowing money?
>
> A. We were not borrowing money at the Peoples Bank.
>
> Q. Mr. Taylor, which of those statements before you, that statement of the Peoples Bank or to the Stanwood Bank is correct?
>
> A. They are both correct for the purpose in which they were prepared." (R. 1961-1962)

Appellant's counsel then put the following question to Taylor:

> "Q. Do I understand then that you, having put out two statements of December 31, 1935, neither of which agrees with each other as to profit or loss, is it your theory that you could put out ten state-

> ments; as long as each one balanced separately they are all right?
>
> A. You can—if you alter figures or make an amended balance sheet for a purpose and it is thoroughly explained nobody is harmed by it." (R. 1962-1963)

Mr. Taylor then explained at length that bankers might want a different valuation placed on assets than that contained in an ordinary financial statement. They would be interested in market values rather than book values (R. 1970-1971). Mr. Taylor insisted that a financial statement given for credit purposes might legitimately vary from a regular financial statement (R. 1982-1983).

It was in the light of this foundation laid upon cross-examination that Mr. Strack was asked on rebuttal if he would accept a financial statement from a borrower if he knew that as of the same date an entirely different financial statement was outstanding. The jury were not experts in matters of accounting. At the time this question was posed to Mr. Strack, the last word on accounting practice had been spoken by Taylor. He had testified at length that different financial statements may be issued for different purposes; that a statement given for credit purposes may be different from other financial statements; that he was justified in composing financial statements which were at variance with each other.

The testimony of the witness Strack was offered to rebut Mr. Taylor's rather informal view of accounting procedure. In accordance with the rule laid down by Wigmore, this rebuttal testimony qualified on two

grounds: it went directly to one of the issues in the case —the skill or lack of skill of Taylor as an accountant (for the want of such skill was a substantial part of appellant's defense); and it went to the testimonial qualification of Taylor, that is to say, not only his skill but also his ethics and character. The offered testimony tended to prove appellant's defense that Taylor failed in his responsibility as an accountant and at the same time it tended to assault the whole foundation of Taylor's credibility as a witness. Surely, these were not collateral matters.

The second question put to Mr. Strack went to the issue of the meaning of cash on hand. Exhibit 252 was a financial statement of appellant dated February 28, 1948, prepared by Taylor. It showed cash on hand and in banks of $293,848.11. The statement was especially prepared for The Peoples National Bank (R. 2285-2286).

We now come to one of the vital maters in the case. Taylor testified that at the date of this statement appellant had in cash the actual sum of only $93,848.11 (R. 2286) as shown by the books of Alpine Dairy, a sole proprietorship, and that appellant's corporate interests were included on a net worth basis. Yet Exhibit 252 showed cash on hand in the sum of $293,848.11. Both counsel for the government and counsel for appellant sought to bring out by cross-examination that the additional sum of $200,000 represented *personal* cash of appellant of which Taylor must have had full knowledge. Whether Taylor had knowledge of Forster's personal holdings and particularly of Account No. 198 in the Washington State Bank at Issaquah, was a matter ab-

solutely fundamental to the responsibility of Taylor in making out tax returns, since a large number of unreported items had passed through Account No. 198. Taylor denied such knowledge.

Counsel for the government sought to show that as of the same date of Exhibit 252, appellant had in cash in Account No. 198, $118,496.32, in the Peoples National Bank $60,687.68, and that Alpine Ice Cream Company (which was at that time a sole proprietorship) had in its account in Peoples National Bank $19,956.91 (R. 2298-2302). These items totalled $199,141.91, or only slightly less than the $200,000.00 adjustment to which Taylor testified in explanation.

How did Taylor seek to explain the fact that his statement, Exhibit 252, showed $200,000.00 more cash than any of the ledgers displayed? His explanation on cross-examination by counsel for the government (R. 2286-2306) was that he had converted $100,000.00 of accounts receivable of Alpine Dairy into cash and that he had converted $100,000.00 of accounts receivable of other Forster enterprises into cash. The matter is summarized by Taylor's testimony as follows:

> "So, we moved that into the cash position for anticipation. We reduced the accounts receivable by $100—$100,000—to show that they had been moved into an anticipation position.
>
> "We then took the statements of the various enterprises, analyzed their cash position, accounts receivable—to determine how much cash could be immediately recovered. We anticipated $100,000.00 could be moved up into the cash position." (R. 2288)

The transaction was again summarized by Taylor under questioning by government counsel as follows:

> "Q. And you reached the figure $293,000 by your estimate of quick liquidation of accounts receivable of Alpine Dairy for $100,000 which reduced Alpine's account $100,000 and moved $100,000 into cash, is that it?
>
> A. Yes, that is correct.
>
> Q. And you calculated what your estimate would be of the cash you could raise similarly in the other companies in which Mr. Forster had an interest, and reached another $100,000?
>
> A. Yes.
>
> Q. And the net result showed a figure of $293,000 cash for financial statement you submitted to the bank in February, 1948?
>
> A. That is correct." (R. 2294)

To summarize, we have Mr. Taylor's testimony in support of his own showing of $293,848.11 cash in Exhibit 252 that he had added to the balance in Alpine Dairy, the sole proprietorship, some $200,000 of accounts receivable and denominated them as cash on hand and in banks.

Now we can see the crucial importance of the question put to Mr. Strack. Are accounts receivable and cash interchangeable and indeed synonymous? Again, the last accounting authority heard from on this question was Mr. Taylor. Mr. Strack was not permitted as a banker and as an expert to contradict the testimony of Taylor.

The danger of excluding this offered testimony becomes apparent when we consider the closing argument

made by counsel for Taylor. He reviewed the various manipulations made by Taylor in producing accounting statements and he said:

> "The Government puts out a booklet showing depreciation rates, but the bank is not interested in book figures. The bank is interested in market values. What would those assets bring if they had to sell them at a foreclosure sale?
>
> "And so, as Mr. Taylor told you on the stand, the depreciation in market value was changed to an appraised value, actual appraised value of the assets.
>
> "Now, every other figure, Ladies and Gentlemen, on these statements is exactly the same. These adjustments that are here made as Mr. Taylor told you on the stand, a collection of various changes which present a true picture for credit purposes on the one hand, against the book figures, which are a true picture for tax purposes on the other hand." (R. 2603)

Counsel for Taylor took advantage of the court's exclusion of the offered rebuttal testimony of the witness Strack to tell the jury that Taylor's views of accounting stood uncontradicted. There had been no testimony denying that Taylor's accounting practices were ethical or correct and it was on this basis that counsel for Taylor carried his argument to the jury.

(2) *The testimony of Frank B. Donaldson*

Frank B. Donaldson was vice-president and trust officer of The Peoples National Bank (R. 2678). He was offered as a rebuttal witness and asked the following question:

> "Mr. Donaldson, I will show you plaintiff's Ex-

hibit 123, a financial statement of Hans Forster dated February 29, 1948, in which the entry for cash on hand and in banks is listed as $293,848.11. Will you state, as a banker, what the significance is to you of the entry 'cash on hand and in the banks'?" R. 2401-2402)

The objection to this question as improper rebuttal was sustained (R. 2402).

Again, Taylor's interpretation of the meaning of "cash on hand and in the banks," an interpretation which allowed him to disclaim knowledge of substantial personal assets of appellant, stood unchallenged and uncontradicted. And yet that knowledge was from the point of view of appellant one of the principal issues in this case.

(3) *The testimony of Quentin H. Ellis*

On cross-examination and recross-examination of Taylor by appellant's counsel, the knowledge on the part of Taylor of personal bank accounts of appellant was a vital issue. The following took place on recross-examination:

"Q. I will ask you if on May 5, 1948, at the Peoples National Bank in your explanation of the assets shown on the statement of February 28, 1948, you did not state to Mr. Ellis in substance and effect that the cash on hand and in banks of 293 thousand dollars, or $293,848.11, was in part Alpine Dairy operation and the remainder personal cash of Hans Forster?

A. No, I have no recollection of it.

Q. Would you say that you did not so state on that occasion on that date the substance of that question in answer to Mr. Ellis?

A. I would say that I did not say that." (R. 2323)

Taylor having denied making such a statement, which disclosed knowledge of $200,000 of appellant's personal cash, appellant offered the testimony of Mr. Ellis in rebuttal. Upon objection to the testimony of Ellis, an offer of proof was made[21] and the offered proof was not received.

The ground of the objection was that the matters raised on cross-examination were collateral. Counsel for appellant pointed out that the offered rebuttal testimony went directly to the question of Taylor's knowledge of appellant's personal affairs (R. 2411).

Again, it must be emphasized that appellant's defense rested upon his claim that Taylor had full knowledge or full access to knowledge of all of appellant's affairs and that Taylor had full responsibility for maintaining financial records and preparing tax returns. Taylor denied that he had any knowledge of any of the appellant's personal affairs and claimed that his work was restricted to certain of appellant's business enterprises. Under the circumstances, testimony that

---

[21] "The offer of proof will be, in substance, that Mr. Ellis phoned Mr. Taylor May 5, 1948, and discussed with him the financial statement dated February 29, 1948, which had been submitted to the bank; that this was not a secret conference in any manner; that the specific items in the statement were discussed, and among them was the item of cash on hand, and in the bank of $293,848.11; that Taylor stated to the witness that of the cash on hand and in banks a part of it was Hans's personal cash, and the remainder belongs to the Alpine Dairy operation." (R. 2406)

Taylor had displayed to a bank officer knowledge that appellant possessed $200,000 in cash goes to the heart of the defense of Forster and the defense of Taylor. The defenses of these two defendants were inconsistent and the jury found appellant guilty and Taylor innocent.

(4) ***The testimony of Vern Egenes***

Alterations in the records of various of appellant's enterprises played an important part in this case. The evidence showed that such alterations had taken place in the records of Renton Ice and Ice Cream Company (R. 2763-2767) and Issaquah (R. 242-245). Defendant's Exhibit A-44 was a financial statement of Finstad & Utgard which had been identified by Mrs. Simonson, formerly a bookkeeper for that company and a witness for the appellant (R. 398-399). This exhibit discloses an alteration in accounts payable of $10,000. Mrs. Simonson testified that she had not made any such alteration (R. 399-410).

On cross-examination, Taylor denied that he had made this alteration and stated that it had been made by Egenes, the general manager of Finstad & Utgard (R. 2113-2115, 2307).

Egenes was therefore called as a rebuttal witness and testimony was offered that he had not made the alteration in question. This offer of proof was rejected as improper rebuttal (R. 2416-2419).

Even though it went to the vital question of who had altered the books, the last word heard on this subject was the testimony of Taylor that Egeness had made the alteration.

Defendant's Exhibit A-122 was a statement of 1947

bonuses paid to Finstad & Utgard milk shippers, in January, 1948. Taylor had testified under cross-examination that the change by Egeness in accounts payable was made to reflect $10,000 in bonuses paid to shippers for the year 1947 (R. 2115, 2307). On re-direct examination of Taylor, defendant's Exhibit A-122 was admitted showing bonus payments for the year 1947 in the sum of $2,139.55. Taylor then testified to the effect that this statement did not include all bonuses paid (R. 2375-2377).

Appellant offered to prove through the rebuttal testimony of Egenes that the total bonus was in fact $2,-139.55 as shown in Exhibit A-122; that no further bonuses were paid with respect to the year 1947; that therefore there could be no proper adjustment of $10,-000 to the books. Objection to this testimony was sustained despite the offer of proof (R. 2416-2419).

The alteration in Exhibit A-44 and the authenticity of Exhibit A-122 are inseparably tied together. If Taylor's explanation of why the adjustment was made failed, it would become clear that he had made the adjustment and that there was no proper purpose.

Once more, the testimony of Taylor was left uncontradicted. Once more, counsel for Taylor argued the matter to the jury:

> "Now, certain other items should be mentioned. In the Finstad & Utgard inventory and accounts payable, there were certain changes made. Now, the increase in accounts payable was due to bonuses which were owed to farmers for milk and it is admitted here that at the end of the year, there were bonuses owed to these farmers for milk that

> wasn't reflected in the books. When Mrs. Simonson prepared her statement from the books, showing her accounts payable, this liability was not in there, and it was a liability of the company. It should have been reflected in the statement if it was going to be an accurate reflection of this business.
>
> "Now, the amount was uncertain. It hadn't been computed at the end of the year, and in prior years, as you will find from the Finstad & Utgard ledger here, if you will look at it, the amount would actually run over ten thousand dollars, so that this figure was carried on as the estimated amount at the end of the year in accordance with the past history and it was based on actual liability that actually existed at the end of the year." (R. 2604)

Appellant's offer of proof, if accepted, would have destroyed the basis for this argument and would have placed appellant in a position clearly to argue the responsibility of Taylor for these alterations. From that the inference would inescapably have followed that the other matters of alteration referred to in the prosecution of this case were done at the behest and upon the responsibility of Taylor.

E. Summary

Appellant contends that in every respect the rebuttal testimony offered and refused complies with the standards of admission.

Whether an accountant may give two different statements to two different persons for the same enterprise for the same date goes directly to Taylor's skill and competence and hence to his credibility.

Appellant should have been permitted to rebut the testimony of Taylor that accounts receivable may be considered as cash on hand and in banks, and the rebuttal would have gone not only to Taylor's testimonial qualifications; but under the circumstances in which the question arose, it went directly to the issue of Taylor's knowledge of Forster's personal cash position.

If the witness Ellis had been permitted to testify to the meeting of May 5, 1948, there would have been further evidence that Taylor knew of Forster's cash position. Such testimony went directly to Taylor's defense of lack of knowledge and therefore absence of responsibility.

The offered testimony concerning alterations in the books of Finstad & Utgard would have established Taylor's complicity and, hence, his responsibility and would have tended to link Taylor with other alterations which were among the most serious charges brought by the government.

The rulings on the rebuttal testimony offered by the appellant left substantial portions of the testimony of Taylor uncontradicted. Counsel for Taylor took advantage of this fact by arguing to the jury that Taylor stood uncontradicted on those matters which the court had not permitted appellant to contradict him. For that reason, after the final argument of counsel for Taylor, appellant moved once more to re-offer its rebuttal testimony and this motion was denied (R. 2623-2626). Appellant's offered rebuttal testimony was refused in the closing days of a lengthy trial, after the defendant Taylor had submitted his own case. Appellant submits that

the testimony was in every respect admissible and that appellant was vitally prejudiced by its refusal.

III. The Trial Court Erred in Denying Appellant's Motion for Mistrial Based Upon Charges Contained in the Opening Statement of Counsel for Defendant Taylor and Directed Against Counsel for Appellant

A. The nature of the charges and the failure of proof in support thereof

Appellant was indicted together with his accountant Taylor and his bookkeeper Erickson upon nine counts charging wilful and knowing attempts to defeat and evade income tax in the filing of corporate and personal returns for the calendar years 1945 through 1949. None of the defendants at any time denied that the returns as filed were incorrect or that the amounts of tax stated in the indictment were due. The defense of appellant was a denial of the element of wilfulness, based upon complete reliance upon his bookkeeping departments which were under the supervision of the defendant Taylor and upon the accuracy of the tax returns prepared by Taylor.

In his opening statement counsel for Taylor told the jury that the evidence would show that Taylor possessed limited knowledge only of the business operations of appellant and no knowledge of appellant's personal affairs.

Counsel for Taylor then went on to charge in his opening statement (R. 87-89) that Taylor had been included in the indictment as the result of a conspiracy between appellant and his attorney, George F. Kachlein, Jr., to "frame" Taylor and place the blame for

shortages upon him. Kachlein thereupon withdrew as counsel for appellant (R. 93, 1176).

The charge contained in this opening statement may be summarized as follows:

1. That Taylor was the victim of a deliberate campaign on the part of appellant and Kachlein to make him the scapegoat for understatements of tax.

2. That Taylor, being then personally represented by Kachlein, had been advised by Kachlein to plead guilty to charges of income tax evasion arising out of his personal tax returns as a part of the alleged conspiracy (R. 87).

3. That Kachlein had represented appellant prior to Taylor's guilty plea (R. 87).

4. That while Taylor had been in prison, Kachlein had gone to Taylor's home and gone through Taylor's personal files and papers in furtherance of the alleged conspiracy (R. 88).

5. That Kachlein had claimed privilege for Taylor's personal files and papers upon demand for production by revenue agents in connection with the instant case (R. 88).

6. That Kachlein had given directions to Taylor's employees during Taylor's absence in prison (R. 88).

7. That Kachlein had advised Taylor to take a vacation during a critical period in the pendency of the investigation of this case (R. 88).

8. That Kachlein had told the revenue agents that Taylor was responsible for any understatements in the tax returns of appellant and appellant's corporate en-

terprises and that appellant had changed his testimony regarding Taylor's responsibility after the first meeting with revenue agents (R. 89).

At the conclusion of the opening statements and prior to the admission of any testimony in this case, counsel for appellant moved for a mistrial on the ground that the attack upon appellant's counsel, even assuming the truth of any statements made, was utterly immaterial to the trial of any of the issues before the court (R. 93). This motion the court denied (R. 95-96).

Any discussion of the legal issues arising out of this motion and its denial must be based upon an analysis of the charges and a consideration of the total failure of any evidence to substantiate these charges. The evidence in fact clearly showed that when the conflict of interest became apparent, Kachlein offered his services first to Taylor as his prior client and the decision that Kachlein should continue to represent Forster was made by Taylor (R. 2218, 2500-2502). This evidence alone should clearly negate any claim of a conspiracy against Taylor.

1. *The charge that Taylor pleaded guilty to charges of evasion of personal income tax upon the advice of Kachlein in furtherance of the alleged conspiracy*

Taylor testified that his personal income tax returns had been investigated in August, 1948, and that he had pleaded guilty in 1950 to one count of tax evasion. At that time he was represented by Kachlein (R. 1595). Taylor admitted that: "I was short in my reporting" and explained:

> "I took the position that it was not intentional, it

was carelessness, and that I did not feel that I had committed any fraud intentionally." (R. 1596)

Again, on cross-examination, Taylor admitted that there was a substantial understatement of tax in his personal returns (R. 2187). Again he pleaded that: "It was just a careless situation that developed" (R. 2189). Since Taylor was licensed public accountant of long standing and since there was no denial whatever that his personal income tax returns disclosed substantial undestatements, it appears from the record that Kachlein's advice to enter a plea of guilty to one count of tax evasion (R. 2189) was well founded. The whole record contains no evidence which would controvert the soundness of this advice.

2. *The charge that Kachlein had represented appellant prior to Taylor's plea of guilty*

Taylor pleaded guilty to the charge of income tax evasion on March 2, 1950, and was sentenced on April 25, 1950, to six months. He was released on September 10, 1950 (R. 1597). Counsel for Taylor, in his opening statement charged that Kachlein had represented appellant prior to this plea in an attempt to show that the plea was in furtherance of the alleged conspiracy.

In support of this charge, Taylor testified that he had turned over certain corporate proceedings of Finstad & Utgard, one of appellant's corporations, to Kachlein in September or October of 1949. The purpose was not stated (R. 1595).

Kachlein testified that Taylor called him by telephone on March 29, 1950 (following Taylor's plea of guilty) in order to arrange a meeting with appellant

whom Kachlein at that time had never met (R. 2457). He first met appellant at a conference held on March 30, 1950, and attended by appellant, Taylor and himself (R. 2458).

Kachlein denied that he had received any books and records of Finstad & Utgard or any other of appellant's enterprises prior to March 30, 1950, and testified that the conference had included a general introduction to the scope and nature of appellant's enterprises and a specific problem dealing with the stock of Finstad & Utgard (R. 2459).

Appellant testified that he had neither met nor conferred upon any matter with Kachlein prior to the latter part of March, 1950 (R. 1425).

3. *The charge that Kachlein went to Taylor's house and went through Taylor's personal files and records in furtherance of the alleged conspiracy*

In his opening statement, counsel for Taylor stated:

> "We will show you that during this period he went out to Mr. Taylor's house, Mr. Taylor being in the federal penal pen, and talked to his wife and gave his wife to understand that he was still working on something involving Mr. Taylor's own personal case and went through his personal files and removed papers therefrom." (R. 88)

The facts were, as shown by Taylor's testimony, that Taylor had given Kachlein a power of attorney to represent him before the Treasury Department (since the question of civil liability was raised by the criminal charges) (R. 1595); that Kachlein had filed a protest against an assertion of deficiencies in May of 1950 and was still handling this matter upon Taylor's return

from prison on September 10, 1950 (R. 1599). Taylor further testified on cross-examination that Kachlein had arranged with the Bureau of Internal Revenue to file a skeleton protest to protect the record until he could confer with Taylor upon Taylor's release from prison (R. 2209).

In substantiation of Taylor's testimony, Kachlein testified that in the latter part of May he had prepared protests relating to certain asserted tax deficiencies of Mr. and Mrs. Taylor; that he had arranged with the bureau for permission to file a supplemental protest after Taylor's return from prison; that he met with Mrs. Taylor and asked to see certain work papers and books which were necessary to the compilation of the protest (R. 2475-2478). The record contains Taylor's letter to Kachlein requesting him to prepare this protest (R. 2480-2481). Kachlein further testified that the papers which he examined in this connection had no relationship to the examination of appellant and related only to Taylor's personal income tax returns (R. 2478). The record is devoid of any evidence that this was not the case.

4. ***The charge that Kachlein claimed privilege as to books and records of Taylor in furtherance of the alleged conspiracy***

In his opening statement, counsel for Taylor stated:

> "We will show you that when the Revenue Agent demanded possession from this attorney of Mr. Taylor's personal files, Mr. Taylor still being away, that this attorney claimed privilege as Mr. Taylor's attorney for those records even though he was then appearing before the Revenue Agents and in-

> sisting that Mr. Forster's troubles should all be blamed on Mr. Taylor." (R. 88)

Such a claim of privilege on behalf of Taylor could hardly evidence the alleged conspiracy.

5. *The charge that Kachlein gave directions to Taylor's employees*

Counsel for Taylor further charged that:

> "We will show you Ladies and Gentlemen that he was giving directions to the accountants in Mr. Taylor's office on behalf of Mr. Taylor during this same period * * * " (R. 88-89)

Taylor's own evidence showed that he had two associates in his accounting practice and that Kachlein had worked out a temporary arrangement for the handling of fees during Taylor's absence in prison pending Taylor's return (R. 1601).

The Kachlein memorandum introduced into evidence by counsel for Taylor contained the following:

> "As this is but a temporary measure pending Mr. Taylor's return, all matters will be subject to adjustment upon his return." (R. 1601-1602, Defendant's Exhibit A-74)

To substantiate the testimony of Taylor, Kachlein testified that it was necessary to protect Taylor against a charge of receiving fees for accounting services while he was in the penitentiary and had been suspended by the state accounting board. He had therefore drawn up a temporary arrangement which would safeguard Taylor's position and yet be subject to his final approval (R. 2484-2487).

6. *The charge that Kachlein advised Taylor to take a vacation during a critical period in the investigation in furtherance of the alleged conspiracy*

Counsel for Taylor charged that:

> " * * * when Mr. *Forster* came back from the penal camp in 1950 this attorney advised Mr. Taylor to take a long vacation, right during the critical period in this investigation * * * " (R. 89)

Kachlein freely testified that Mrs. Taylor had planned such a trip and had asked his advice on or about August 29, 1950, prior to Taylor's return from the penitentiary; that he approved, believing that such a vacation would help Taylor to regain his composure and status in the community. This suggestion was made prior to any indication of a claim of criminal liability against Taylor in this case (R. 2490-2493).

7. *The charge that Kachlein had stated to the revenue agents that Taylor was responsible for deficiencies in tax returns of appellant and appellant's corporate enterprises*

The final charge leveled against Kachlein in the opening statement was that he had himself, and had caused appellant, to make statements to the revenue agents to the effect that the responsibility for the state of appellant's books and records and tax returns lay with Taylor (R. 88-89).

Revenue agent Marx testified that at his first meeting with Kachlein on appellant's case, Kachlein had observed that if accounting errors had been made, it was undoubtedly due to sloppy accounting work on the part of Taylor (R. 354-355). Kachlein testified that Marx had worked on Taylor's personal case and was familiar

with Taylor's accounting habits and practices (R. 2515). Taylor himself had pleaded carelessness and negligence in his own testimony (R. 1596-1597, 2189).

Kachlein testified as to his own acquaintance with the quality of Taylor's work (R. 2439-2442). He related how he had taken the position on behalf of Taylor in Taylor's personal evasion case that there was no wilfulness involved and that the understatements had resulted from negligence and inability to cope with the quantity of work which he had undertaken (R. 2442-2448). Kachlein therefore agreed that he had stated to revenue agent Marx on April 26, 1950, that errors in the Forster books may have been the result of similar negligence and carelessness. Such statements were made in defense of Taylor as well as appellant (R. 2489). As Kachlein testified under cross-examination by counsel for Taylor:

> "Q. Did you—did it not make you believe that there was a conflict in your representation of these two parties when you made such a statement?
>
> A. No, I didn't think so, because sloppy bookkeeping didn't mean fraudulent transactions." (R. 2514)

Taylor's counsel then charged that appellant had first exonerated Taylor, stating appellant had said to the revenue agents at their first meeting on April 26, 1950:

> " * * * that if there were any difficulties with his returns — any income that was not reported — it could not be Mr. Taylor's fault * * * " (R. 89)

A careful reading of the testimony of revenue agent Marx on this subject (R. 355-356) will show that ap-

pellant's statement was limited to certain personal items only. And this charge is basically inconsistent with the prior charge that the conspiracy was in full swing at and before the day that Taylor personally pleaded guilty (March 2, 1950).

8. *The termination of the Kachlein-Taylor relationship conclusively disproved the alleged conspiracy*

Although the previous summary demonstrates the absence of any evidence in support of a theory of conspiracy between appellant and Kachlein, to make Taylor the scapegoat, the clearest evidence that no such conspiracy existed is found in the facts relating to the termination of Kachlein's representation of Taylor.

Kachlein testified that he first recognized the possibility of a conflict in interest between representation of Taylor and appellant on the 23rd or 24th of October, 1950, after a trip to the Issaquah Creamery Co. had disclosed certain manipulations of the books of account (R. 2512). On October 26, 1950, he had a lengthy conference with revenue agents Eppler and Marx which further strengthened his realization that such a conflict did exist (R. 2513). He had not realized the existence of such a conflict on September 13, 1950, when he had conferred with Taylor upon Taylor's return from the penitentiary (R. 2523-2525).

Kachlein therefore conferred with Taylor on October 27, 1950. He outlined the conflict of interest and offered to represent Taylor and withdraw from the representation of Forster. His testimony on this point is as follows:

"* * * as a lawyer sometimes finds himself in the

place where you have two people that you have done work for, it was essential for me either to withdraw entirely from the case or, with the consent of both parties, represent one, and that he being the first client in time he would have—if Mr. Forster approved I could represent Mr. Taylor, or, if Mr. Taylor felt it would be better I represent Mr. Forster, with his approval I could represent Mr. Forster." (R. 2500-2501)

It was at this point that Taylor made the choice that Kachlein should continue to represent Forster, and upon the advice of Kachlein, Taylor engaged Mr. LeSourd who served as his counsel at the time of trial (R. 2501-2502).

The record is conclusive upon the testimony of Taylor that first choice in the matter of representation was granted to him and that of his own volition he yielded to Forster (R. 2179, 2218).

B. Appellant's motion for mistrial based upon statements contained in the opening argument of counsel for defendant should have been granted because the issue raised was irrelevant, immaterial and incompetent

"A fundamental test of relevancy is whether the conclusion sought to be established is a probable inference from the offered fact." *Guthrie v. United States* (C.A.D.C., 1953) 207 F.(2d) 19, 24.

The indictment charged that the three defendants had wilfully and knowingly attempted to defeat and evade a large part of taxes owing by the appellant or his corporations. There was no question that the returns had been filed and that they contained substan-

tial understatements of tax due. The issue in this case was whether there had been knowing and wilful attempts to evade taxes contrary to statute * * * and, if so, by whom.

The conclusion sought to be established on either side in this case was that the conduct of the various defendants had or had not been wilful. None of the matters outlined in that portion of Taylor's opening statement wherein appellant and his attorney were accused of fomenting a conspiracy against Taylor could have created inferences that the conduct of Taylor either was or was not wilful. All of those matters took place after the last return had been filed upon which the indictment was based.

Even had it been true that Kachlein had represented Forster prior to Taylor's plea of guilty (and the evidence was otherwise), that fact did not tend to prove Taylor's lack of wilfulness in connection with the tax returns in question. The same is true of Taylor's plea of guilty to charges of evasion in his own personal returns. Likewise, the charge that, during Taylor's penitentiary sentence, Kachlein had spoken to Mrs. Taylor, had gone through Taylor's personal files and removed papers admittedly in connection with Taylor's personal affairs, would hardly tend to raise any inference connected with Taylor's wilfulness or lack of wilfulness in the filing of the tax returns set forth in the indictment. The fact that Kachlein gave certain directions to accountants in Taylor's office during Taylor's penitentiary sentence concerning fee arrangements had no logical connection whatever with the issues raised by

the indictment, and the same is true of Kachlein's advice to Taylor to take a vacation after the completion of his prison sentence. Nothing could be more remote from the issue raised by the indictment than the charge that Kachlein had claimed privilege on behalf of certain personal files of Taylor when the revenue agents sought possession of them.

Finally, the charge that Kachlein had placed the responsibility for the shortages set forth in the indictment upon Taylor did not and could not of itself tend to prove or disprove whether or not those shortages were the result of wilful conduct on the part of Taylor. The test must necessarily be the intent and state of mind of Taylor at the time the returns in question were prepared and filed and not any statements made by an attorney at a subsequent date.

Not only did the evidence outlined in this portion of the opening statement for defendant Taylor fail to meet the tests of relevancy; it was clearly immaterial and incompetent. Even evidence which has some logical tendency to affirm or deny the fundamental issue may be inadmissible on other grounds. This is especially true where the probative value of the proffered evidence is slight as compared to the disadvantages inherent in it. Thus, evidence which may be logically relevant may unduly confuse the issues or create undue prejudice. Wigmore on Evidence, 3rd Edition, §29(a), 42.

In *United States v. Krulewitch* (C.A. 2, 1944) 145 F.(2d) 76, 80, the court said:

> "In short, that if evidence is relevant to prove one crime, it does not become inadmissible because

it also proves another. Such is indeed the law; yet, here as always, the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth; and that does not inevitably follow from the fact that it is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict * * * "

The trial of this case afforded a supreme example of the confusion of issues when it degenerated over lengthy periods of time into a trial of the conduct of George Kachlein rather than the appellant and his co-defendants. Few issues could have more severely prejudiced the appellant. The basic charge in the indictment was fraud; and the essence of the charge against appellant and Kachlein was another fraudulent conspiracy to shift to Taylor the blame for the admitted understatements.

C. The misconduct of Taylor's counsel in inserting this issue into the case is ground for reversal

When all the evidence had been heard, the existence of any conspiracy was conclusively disproved. Certainly Kachlein had advised Taylor to plead guilty; on his own testimony there was no other alternative. In talking with Mrs. Taylor and preparing a protest relating to Taylor's civil tax liabilities, Kachlein was clearly acting in the interest and to the benefit of Taylor and the same is true of the arrangement he devised

for the division of accountants' fees by Taylor's associates during Taylor's incarceration. This matter relating to the division of accountants' fees is a clear indication of how far-fetched was the initial charge and how prejudicial and injurious the effect of permitting the evidence and the issue to go to the jury.

The point at which this charge of conspiracy failed utterly was Taylor's own admission that he had the first call upon Kachlein's services and that Kachlein continued to represent appellant only upon Taylor's advice (R. 2179, 2218). Surely, no conspirator would willingly offer to become the victim of his own conspiracy.

The courts have always been zealous to protect criminal defendants against improper conduct on the part of opposing counsel, whether in argument, cross-examination or other phases of the presentation of the case. The present case is unusual in that the improper conduct is on the part of counsel for a defendant rather than the prosecuting attorney; but there should be no difference in principle if the rights of the appellant have been prejudiced.

In considering the charges levelled against Kachlein, it is necessary to appreciate the importance of the lawyer in litigation as recognized by Judge Frank in his dissenting opinion in *United States v. Antonelli Fireworks Co.* (C.A. 2, 1946) 155 F.(2d) 631, 653, 654:

> "Applying the usual 'harmless error' doctrine, the courts generally hold that improper remarks (or other similar misconduct) of counsel will be deemed to have induced the verdict (Berger v. United States, 295 U.S. 78, 85-89, 55 S.Ct. 629, 79

> L.Ed. 1314) and to require reversal. For such remarks may affect the jury even more than erroneously admitted evidence. Close students of the subject, such as Morgan, tell us that today, unfortunately, a jury trial usually is 'a game in which the contestants are not the litigants but the lawyers.' An experienced trial lawyer writes: 'It is a well recognized fact that in most cases the jury 'tries' the lawyers rather than the clients * * * The personality of the lawyer is constantly before the jury and he gradually absorbs the client's cause to such an extent that unconsciously in the minds of the jury it becomes the lawyer's cause'."

In *Berger v. United States*, 295 U.S. 78, 85, the Supreme Court reversed a conviction where the prosecuting attorney had been guilty of misstating facts in cross-examination, of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered, of assuming prejudicial facts not in evidence and in general of conducting himself in a "thoroughly indecorous and improper manner." It is vital to note the Supreme Court's statement that:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."

The Supreme Court found prejudice under the circumstances "so highly probable" that it awarded a new trial.

See also *Pierce v. United States* (C.A. 6, 1936) 86 F. (2d) 949, 952, reversed because of the improper conduct of the prosecuting attorney.

In *New York Central Railroad Co. v. Johnson,* 279 U.S. 310, 318, counsel for the plaintiff had argued that the defendant had attempted to raise as a defense that plaintiff's disabilities were caused by syphilis. There was no foundation in the record for such a charge. In reversing the judgment for plaintiff the Supreme Court said:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. . . . The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. . . . That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument." (citations omitted)

Read v. United States (C.A. 8, 1930) 42 F.(2d) 636, 645, involved the alleged misapplication of bank funds. The prosecuting attorney had sought to argue, outside of the evidence, that the defendants had preserved their personal fortunes while the innocent depositors had suffered. The circuit court reversed the conviction because of counsel's improper argument and cited *New York Central Railroad Co. v. Johnson, supra,* adding:

> "This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one."

In *Brown v. Walter* (C.A. 2, 1933) 62 F.(2d) 798, 799-800, the court said:

> "We should therefore hardly have passed the verdict, had the matter rested there; but the injustice became much more serious, when the plaintiff came to sum up. Then he spun a web of suspicion of which there was no warrant whatever. He argued with much warmth that the whole defense had been fabricated by the insurer—transparently veiled by such provocative phrases as 'unseen hand,' and an 'unseen force,' and the like. This had not the slightest support in the evidence; it was unfair to the last degree. Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defense. A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge."

In *Woolworth Co. v. Wilson* (C.A. 5, 1934) 74 F.(2d) 439, 442-443, counsel for the plaintiff stated in argument that "they trumped up the whole case." Judgment for plaintiff was reversed, the Court of Appeals stating:

> "The fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up."

Other cases in which the misconduct of counsel has

led to reversal are legion: *Latham v. United States* (C.A. 5, 1915) 226 Fed. 420; *Skuy v. United States* (C.A. 8, 1919) 261 Fed. 316; *Volkmor v. United States* (C.A. 6, 1926) 13 F.(2d) 594; *Robinson v. United States* (C.A. 8, 1928) 32 F.(2d) 505; *Pharr v. United States* (C.A. 6, 1931) 48 F.(2d) 767; *Towbin v. United States* (C.A. 10, 1938) 93 F.(2d) 861; *Missouri-K.-T. Railroad Co. v. Ridgway* (C.A. 8, 1951) 191 F.(2d) 363; *Minker v. United States* (C.A. 3, 1936) 85 F.(2d) 425; *Levinson v. Fidelity & Casualty Co. of New York* (Ill.) 181 N.E. 321; *Masterson v. Chicago & Northwestern Railway Co.* (Wisc.) 78 N.W. 757.

D. Improper statements contained in the opening argument of counsel for Taylor could not be cured by the court's instruction

At the close of the opening arguments the court made the following statement (R. 91-92):

> "Before we recess, I think the Court should advise you as to all opening statements made on behalf of the Government and all Defendants, that the purpose of an opening statement is to outline the theory of the case that the particular Plaintiff or particular Defendant proposes to take in the case.
>
> "Likewise, they outline the evidence as they believe it will be established or as it will be brought out in the course of the trial.
>
> "Occasionally opening statements may border on argument and that isn't intentional but it is sometimes difficult for a lawyer to limit himself to a statement of his theory and proof without going into argument, but the caution I want to give you at this time is this: That you are not to consider

opening statements as evidence of any kind but merely as being helpful to your understanding of the evidence as it comes in and, of course, the proof as it is brought out in the course of testimony and through exhibits constitutes the evidence which you will consider finally in determining the guilt or innocence of these defendants."

Appellant thereupon made his motion for mistrial based upon the opening statement of counsel for Taylor and the motion was denied (R. 93-95).

Appellant was thus forced into meeting the charges advanced by Taylor. This was true because even a successful effort to exclude evidence in support of the opening statement's charges could not have effaced from the memory of the jury the nature of the charges themselves. From a practical standpoint, the motion for mistrial having been denied, appellant had no real choice in the presentation of his case and was forced into issues which created confusion and prejudice.

As the court said in *Berger v. United States, supra*:

> "The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

In *Robinson v. United States, supra,* the court said at p. 508:

> "There are times when no admonition or instructions of the court can remove from the jury's

> mind the effect of improper conduct and remarks of counsel, and we think this is true in this case. These principles are supported by the authorities." (Citations omitted)

And in *Volkmor v. United States, supra,* the court said:

> "Whether there has been a correction of the abuse of argument by a withdrawal of the objectionable parts of it depends upon whether on considering the whole case the error appears to have been so serious that it likely affected the minds of the jury despite the attempted correction by counsel or court. . . . If, however, upon a consideration of the whole case, the error appears so egregious as to have affected the minds of the jury, despite the attempted correction, the verdict must be set aside. This case strikingly illustrates the justice of that rule." (p. 595)

For the same proposition, see also *Latham v. United States, supra; Pharr v. United States, supra; Levinson v. Fidelity & Casualty Co. of New York, supra.*

The proper action for the trial court after appellant's motion for mistrial at the conclusion of the opening arguments is indicated by *Minker v. United States, supra,* at p. 427:

> "We think that the entire tenor of the prosecuting attorney's statements was decidedly and unfairly prejudicial. It may be noted that in the instant case the jurors who heard the prosecuting attorney's over-zealous and prejudicial remarks might have been withdrawn and a new jury impaneled immediately thereafter to hear the case against the appellant without prejudice to the government's position."

E. The trial court should have declared a mistrial at the conclusion of the evidence

Appellant's motion for a mistrial (R. 93) having been denied (R. 95), evidence was heard on the charges of conspiracy leveled against appellant and Kachlein. When the testimony revealed no substance in support of these charges, the trial court should have declared a mistrial of its own motion. The outline of testimony contained in pages 70 to 80 of this brief shows that the charges were groundless and, as has been previously stated, that the ultimate choice of counsel lay in the hands of Taylor (R. 2501, 2179, 2218).

In *VanGorder v. United States* (C.A. 8, 1927) 21 F. (2d) 939, 942, the court said:

> "But, since the decision of the Supreme Court in Wiborg v. United States, 163 U.S. 632, 659, * * *, there has been and still exists an alleviation in the interest of justice of the strict rule and practice that no relief whatever may be granted by the federal appellate courts, except on recorded objections or exceptions to rulings in the trial courts, to the effect that in criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights, although those errors were not challenged or reserved by objections, motions, exceptions, or assignments of error."

That rule was again emphasized in *New York Central Railroad Co. v. Johnson, supra,* where the court stated at p. 318:

> "Respondents urge that the objections were not

> sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy ... of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. . . . Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error." (Citations omitted)

In *Read v. United States, supra,* no exceptions were taken to the remarks of the prosecuting attorney which were later held prejudicial by the circuit court. On the authority of *VanGorder v. United States, supra,* and *New York Central Railroad Co. v. Johnson, supra,* the conviction was nevertheless reversed.

The duty of the trial court to act of its own motion to prevent prejudice and secure a fair trial, even in the absence of objections, motions or other action by counsel is emphasized in the following cases: *Johnston v. United States* (C.A. 9, 1907) 154 Fed. 445; *Skuy v. United States, supra; Volkmor v. United States, supra; Brown v. Walter, supra; Berger v. United States, supra; Masterson v. Chicago & Northwestern Railway Co., supra.*

The recent decision of this court of *Herzog v. United*

States (C.A. 9, 1955) 226 F.(2d) 561, does not change the rule announced by these cases. The *Herzog* case deals with the relationship of Federal Rules of Criminal Procedure 52 (b) and 30. Rule 52 (b) preserves to litigants plain error or defects affecting substantial rights, although they were not brought to the attention of the court. Rule 30 provides that no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. The holding of this court in the *Herzog* case was that the appellate courts may not consider under Rule 52 matters which another rule specifically states shall not be assigned as error.

No portion of the Federal Rules of Criminal Procedure precludes this court from considering the failure of the trial court to grant a mistrial at the close of the evidence, even in the absence of any motion therefor by the appellant. Appellant submits that the charges brought against appellant and his counsel in the opening statement of Taylor's counsel were irrelevant, immaterial and incompetent and should have occasioned a mistrial upon appellant's motion. Appellant further submits that the evidence failed completely to support these contentions which imported a maximum of prejudice against appellant into the case and thoroughly confused the fundamental issues. On this record, therefore, it is competent for this court to notice the effect of this issue upon the trial and the trial court's failure to cure the difficulty in the only way possible after the evidence had been submitted—by declaring a mistrial.

F. The trial court erred in refusing appellant's motion for a new trial

Appellant's motion for a new trial (R. 16-17) included in its grounds "errors of law during the trial to which exception was duly taken."

Exception was duly taken to the conspiracy charges in the opening statement of counsel for Taylor by means of appellant's motion for a mistrial. On appellant's motion for new trial, the court had not only heard the evidence, but it had seen the extraordinary result of the trial which resulted in the conviction of appellant and the acquittal of Taylor. For all of the reasons already set forth, it was error for the trial court to enter its order denying appellant's motion for acquittal and in the alternative for a new trial (R. 17-18).

CONCLUSION

For the reasons stated, the judgment of guilty as to appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

Tracy E. Griffin,
J. Kenneth Brody,
Attorneys for Appellant.

No. 14656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HANS FORSTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON — 3/1/56 — 45 COPIES

FILED

No. 14656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HANS FORSTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

BALLARD NEWS, SEATTLE, WASHINGTON — 3/1/56 — 45 COPIES

INDEX

	Page
QUESTIONS PRESENTED	1
COUNTER STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
1. Evidence of Forster Evasion	7
2. The Instructions	15
3. Additional or Supplemental Instructions	18
4. "Kachlein Affair"	20
5. Rebuttal Witnesses	26
A. Strack	29
B. Donaldson	29
C. Egeness	30
D. Ellis	31
6. The Bloch Case	32

TABLE OF CASES

Bateman v. U. S., 212 F. 2d 61	35
Bloch v. U. S., 221 F. 2d 786	32, 33
Bollenbach v. U. S., 326 U. S. 607	19, 20
Cottingham v. U. S., 54 U.S.T.C 338	18
Friedberg v. U. S., 207 F. 2d 777; 348 U. S. 142; 53-2 U.S.T.C. par. 9631	34, 35
Hargrove v. U. S., 67 F. 2d 820	33
Herzog v. U. S., 226 F. 2d 561	32, 33
Legatos v. U. S., 222 F. 2d 678	34

Page

Mitchell v. U. S., 213 F. 2d 951 20

Morissette v. U. S., 342 U.S. 246 34

Remmer v. U. S., 205 F. 2d 61 35

U. S. v. Martell, 199 F. 2d 670 34

No. 14656

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HANS FORSTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Whether the instructions given by the court adequately protected the rights of the defendant.

2. Whether the defendant, a man of many enterprises, can personally divert many thousands of dollars of unrecorded income into his personal savings

account and assert that the responsibility for admitted understatement of income is due to the incompetence of his bookkeeper and accountant.

3. Whether a defendant can pay personal bills of $107,780.36 from his business account and have the same charged as deductions under various business headings and escape responsibility.

4. Whether the refusal of the court in a lengthy trial to permit rebuttal of remote and collateral matters is prejudicial to the defendant.

5. Whether reference to the activities of a lawyer on behalf of the appellant who, at one time was an attorney for a co-defendant, constitutes prejudicial error.

COUNTER STATEMENT OF THE CASE

The Government believes a counter statement of the case is advisable.

Hans Forster, an astute business man, builded from the depression enterprises comprised of eight companies which had a sales volume of over eight million dollars yearly, which he sold for $2,600,000, exclusive of inventory. During these times he had the daily services of co-defendant Erickson, a bookeeper who kept the journals of two of the companies at Issaquah,

Washington, and monthly data were delivered to co-defendant Taylor, who kept general ledgers at Seattle.

Taylor became involved in personal tax evasion difficulties and, as a result, an investigation was commenced of Forster's personal income tax returns and the returns of Issaquah Creamery Company. This investigation disclosed an admitted understatement of hundreds of thousands of dollars of income and that much of this understatement arose because income was not recorded on the books of the company but was deposited in Forster's personal savings account at Issaquah.

Forster's accountants, after an audit could not estimate the tax due to the Government but it was generally agreed to be in excess of $1,000,000. It also developed that Forster paid many thousands of dollars of personal expenses by checks signed by him which Erickson recorded on the books under deceptive deductible items. Thereafter, Forster, Taylor and Erickson were indicted for the evasion of Forster's taxes individually and for the Issaquah Creamery Company during the years 1945 through 1949.

The Government in its proof presented evidence from several companies Forster controlled to prove the unrecorded income and the method by which it was done. The Court during the trial permitted lengthy

examination by counsel for each defendant on the bookkeeping procedures of the related companies. Several collateral matters of bookkeeping were inquired into generally over the Government's protest.

Prior to the instant case George Kachlein, an attorney, who had represented Taylor in his tax evasion difficulties, entered an appearance as counsel for Forster and before the trial Taylor moved for a severance because of alleged conflict of interest, which was opposed by the Government and counsel for Forster and denied by the Court. From the opening of the trial the claimed dual representation by Kachlein was referred to over Government objection. The defense of Forster was unique. It was admitted by his counsel that very substantial income was understated and that substantial taxes were due the Government. He admitted receiving the income and admitted payment of his personal bills with company checks. His explanation of his failure to report was that he expected Erickson to properly make the charges and expected Taylor to have knowledge of unrecorded income received at Issaquah.

Erickson admitted receiving income at Issaquah which he did not record on the books and which he gave to Forster. He admitted entries on the books under deceptive business deduction expense items.

Forster admitted that the unrecorded income went into a personal savings account in a bank at Issaquah. Taylor claimed he was ignorant of these matters. One thing all of the defendants agreed on was that in 1950 a meeting was held at Issaquah and Forster questioned and complained that the 1949 income was too much. Thereafter the evidence is in dispute, as to how it was done, but the income of Issaquah Creamery Company was arbitrarily reduced $51,578.76. Forster claimed Taylor did it. Taylor blamed Forster and Erickson. Forster and Erickson shifted the responsibility, but it was not disputed that it occurred.

The record is full of protestations of good faith and contradiction and each defendant blamed the other and attempted to exculpate himself. Erickson received a modest salary for his services and Taylor a nominal fee for his work. Forster was the only beneficiary of the understatement of income and evasion of taxes.

After the jury was instructed they asked and received a supplemental instruction from the court and ten hours later returned a verdict convicting Forster on all counts and acquitting Taylor and Erickson. It is not the appellee's position that the evidence was insufficient to convict Taylor and Erickson but that the jury failed to convict them for reasons sufficient to themselves.

SUMMARY OF THE ARGUMENT

1. The evidence clearly shows that Forster independently of his bookkeeper and accountant cleverly diverted unrecorded income and used deceptive items to conceal his evasion.

2. The instructions given by the court adequately define the issues and emphasize the essential elements of the charge, including specific wrongful intent.

3. The supplemental instruction given by the court did not prejudice the appellant.

4. The instruction of the Kachlein-Taylor relationship was invited by the appellant's counsel and was used by the appellant throughout the trial to attempt to escape responsibility for his own activities.

5. The trial court was correct in its rulings in excluding rebuttal of collateral matters brought out in cross examination, which were immaterial and had no bearing on the substantive issues of the case.

The Government submits that Forster's own admissions are more than sufficient to establish his guilt beyond a reasonable doubt and any questioned instruction or ruling was at most harmless.

EVIDENCE OF FORSTER EVASION

The appellant's brief skillfully avoids discussion of Forster's personal activities in income diversion. It is argued that a millionaire businessman left everything to Taylor and Erickson and kept no books of account. No one who can read or write should advance such a theory and expect to be believed. We can for this purpose eliminate Taylor and his unusual bookkeeping which only benefited Forster and examine the record. It shows thousands of dollars which were received in Issaquah by Forster and UNRECORDED and deposited in Account 198 (Ex. 55, Hans Forster's personal savings account). It also shows thousands of dollars of personal expenses, including a Cadillac automobile, a sailboat, his daughter's wedding reception, his Swiss Military Tax, charged under deceptive business items such as plant expense, truck expense, supplies, advertising, etc.

Ira Eppler, a revenue agent, testified in detail as to the amount of unrecorded income which went into Account 198 (R. 147-349), and the stipulation of counsel for the appellant (Ex. 238) admits that these sums, $107,780.86, (R. 1768) were unrecorded and were deposited in the bank in Account 198, the personal account of Forster, and one deposit in 1945 of $49,552.82 (Ex. 53) contained $850 in currency

(R. 158). $17,100 of Simonson and Forster checks were deposited therein. Renton Ice and Ice Cream Company's checks made payable to Issaquah Creamery Company were brought to Forster by employees, who stated they had no place on the books for them and left them in Forster's desk, and sales slips were thrown away by Forster (R. 174-180). Milk equalization checks for $23,030.92, payable to the Issaquah Creamery Company, were deposited in this personal savings account (R. 176, R. 267-268). Forster admitted that the Time Oil Company cash rebates had not been reported in his tax returns (R. 208-211). Some $24,000 of Daisy Ice Cream Company checks went into Forster's personal account 198 (R. 274).

On Forster's personal expenses Eppler testified that the training of hunting dogs was charged as miscellaneous expense (R. 216-217); personal traveler's checks, personal clothing, television set, jewelry, and Lightning Sailboat charged to supplies (R. 222-226, 302); a Cadillac for Mrs. Forster charged to truck expense (R. 227); $1695.92 wedding reception for daughter charged to advertising (R. 227-228); cash for personal use charged to plant expense (R. 229); checks to Swiss Legation for Military Tax charged to plant and advertising (R. 231-233, 240-241); checks to Merrill, Lynch, Pierce, Fenner and Beane (R. 229)

charged to plant expense. Personal expenses between 1945 and 1949 came to a total of $48,509.75 and were used as deductions on the returns (R.234-239). A check for $5,744.44 to Puget Sound Products (Ex. 64) listed on the books as butter purchases and deposited in Account 198 was admitted by Forster as not for butter (R. 247). $18,305 of currency was deposited in 1945, some of which was Time Oil Company rebates and farm rental income (R. 248). Forster carried his children on the pay roll while abroad and at finishing school (R. 311). Butter sales were not recorded on the books (R. 324).

It is to be noted the bookkeeper at Issaquah did not ask Taylor's advice about business deduction items (R. 331). The cross examination by appellant's counsel was extended and co-defendant Erickson even identified a list of unrecorded personal items (R. 278). Examination of income tax returns did not show individual items of sales omitted. It is to be noted that a national firm of accountants estimated the tax due by Forster and his company amounted to $1,375,000 (R. 261).

The above reference to the record is only a part of the diversion by Forster of income at Issaquah without any help from Taylor. Exhibit 238, which is

a stipulation of checks received at Issaquah and payable to the Issaquah Creamery Company which were deposited in Forster's personal savings account and unreported and unrecorded, should be examined. It contains 283 items ranging in amounts from $2.22 to $10,742.40. Counsel for the appellant in his stipulation and by his statements in court throughout the trial referred to it for the purpose of showing Forster's cooperation with the Government, but this did not explain the evasions. Exhibit 55 is a damaging piece of evidence against Forster. It is Account 198 in the Washington State Bank at Issaquah. Into it went the diverted receipts of cash and checks and Taylor had nothing to do with this account and yet it shows a balance of $21,605.83 on January 6, 1944, and throughout the period of the indictment increased to $129,802.95 as of September 22, 1948, although substantial withdrawals occurred in the interim, and on December 31, 1949, it had a balance of $91,806.70 although there had been withdrawals of approximately $70,000 during the year (R. 1137-1138).

Forster admitted that he could figure profits (R. 1153, 1159). It is unbelievable that an astute business man could with innocence make these collections and claim innocence when he was personally diverting the checks. Another strong point against Forster's claimed ignorance is the recital of the Janu-

ary 1950 meeting concerning the 1949 profits of the Issaquah Creamery Company. All of the defendants, including Forster, agreed that Forster had complained about the profits (R. 965, 1006). Taylor's account of the matter is found in the following portions of the record: R. 1553-1561, 1820-1833, 2162-2176, 2368-2370. Forster's version is found in the record at 1318-1323.

Forster admitted that Erickson, who was a co-defendant and whose testimony is not in the record, was the office manager and had charge of the book-keeping at Issaquah (R. 1229-1233).

We might observe here that Taylor, the account-ant, was receiving an income of about $5,000 for accounting services for eight companies, or an average of $50 per month per company, and that Erickson's salary varied from $2700 in 1945 to $5400 in 1949 (R. 692-693). Income taxes were not their financial concern. It did vitally concern Forster. He had to pay it. All agreed that the 1949 books were altered in sums varying from $50,000 to $80,000, and taxes were paid on the lower figure.

Government Exhibit 280 shows that for that year Issaquah Creamery Company reported on its return $49,725.48 when it should have reported $204,313.47. Who got the benefit?

Exhibit 279 demonstrates conclusively the evasion of unreported income and a shortage of taxes as follows:

For 1945	$18,320.90
For 1946	$69,577.71
For 1947	$52,886.66
For 1948	$59,727.83
For 1949	$53,850.57

The defendant's financial statements show interesting figures. Exhibit 124, over the appellant's signature, shows an increase in assets of $200,000 in 1947. In fact, Exhibits 121 to 130 are financial data which explode the protest of Forster's claimed ignorance (R. 1006-1012).

We hold no brief for Taylor or for Erickson because we think the record shows they actively participated in the evasion, and we also earnestly suggest that Taylor's statement in 1950 about the changes made in the 1949 books, "I will change my ledger accordingly, and you and Harold [meaning Erickson] will have to substantiate the changes that are made" has a ring of verity (R. 1561). Forster's statement that Taylor and he never discussed income tax is unbelievable (R. 1100).

Exhibit 279 shows that over $9,000 cash of Time Oil Company payments were received by Forster for which monthly receipts (Ex. 172-173) were issued,

and it was stipulated by counsel as having been received by Forster or his employees (R. 106-109). Forster discusses this cash agreement and attempts to explain it (R. 935-937).

Forster's claimed ignorance received a setback from one of his longtime employees. Caroline Neukirchen, a reluctant witness, employed by Forster since 1933 and who maintaned the Accounts Receivable, testified that she received instructions directly from Forster not to record items (R. 111, 125-127) and was ordered by Forster to put them in his desk (R. 128-131) and did not include them in the company's deposit slips (R. 132-136). On cross examination it was stipulated that the checks went into Forster's savings account and the books did not show any of the omissions (R. 146-147). It is interesting to note that Miss Neukirchen once objected to Forster and his reply to her, quoted in part, gives the key to his desire to evade and defraud:

> "A. He told me that I was not doing anything wrong; and that he asked me, 'Are you withholding money from me?'; and I said, 'No, I wasn't withholding any money.'; and he said, 'Well, you are not doing anything wrong then."; * * *"
> (R. 143)

The recital of Forster's participation in the Renton Ice and Ice Cream Company's manipulation of checks and salaries of Schneider and Mazie Basket [a widow who is now married to Lovinger and will be

referred to as Basket] should be sufficient in itself to establish Forster's guilt. Forster was a stockholder in the company and had arranged for its purchase. He had no salary account on the books and yet he received income from the other stockholders, by having its two officers endorse a part of their salary checks to him, on which they paid income tax and which he did not report (R. 2725-2763).

In order to perfect the system and to make discovery more difficult, bank cashier's checks in substantial amounts up to $7710 were issued at a bank (Ex. 77) and mailed to Forster at Issaquah (R. 2736-2737). The checks showed salaries of $6,000 a year to each of these parties (R. 2738-2746) although Forster received a substatial portion of them. Basket, a widow, who was working for the company, was paid $170 per month salary and her testimony confirms Schneider, the other officer, in the method used to channel funds to Forster. An examination of Exhibits 203, 204, 206, 207, and 208 is an interesting example of a plan cleverly conceived, deliberately executed for the sole object of tax evasion which finally resulted in failure.

How can there be a sincere claim that the defense was based upon complete reliance on the bookkeeping and accounting be asserted? Nowhere was it shown

that Taylor had anything except knowledge of the diversions at Issaquah and the payment of thousands of dollars of personal expenses under deceptive recordings. In fact, the record abundantly reveals Forster and Erickson's participation, which may or may not have been known to Taylor, but resulted in a skillful evasion of taxes.

THE INSTRUCTIONS

The appellant found no fault with the Court's original instructions which clearly and definitely made willful evasion an essential element of the charge. A portion of the court's charge is set forth on page 16 of appellant's brief. There was no objection to these instructions except the use of the words "reckless disregard." In fact, counsel for the appellant in his exception to the supplemental instruction stated in referring to it "* * * except for the use of the words 'reckless disregard' was a full and complete instruction in that particular as I view it." (R. 2676)

The court gave a clear and complete definition of reasonable doubt and required the Government to prove "every essential element" (R. 2648) and again cautioned the jury: "If you find him innocent, say so. Remember at all times that a defendant must be acquitted if any reasonable doubt remains in your minds." (R. 2650)

The court fully defined the three essential elements (R. 2655), and then again states: "On the other hand, if you have any reasonable doubt as to any one of these three elements you should acquit the partiular defendant concerned as to such count" (R. 2657). And on the same page the court stated: "What consideration you are to give the evidence as to these items in connection with the remaining two essential elements, namely, each defendant's knowledge that substantial tax was owing, and whether there existed a willful attempt on the part of any or all of the defendants to evade any of it, is a matter left exclusively and entirely to your determination." (R. 2657)

The court warned against imputed crime to a defendant because of the acts of another and required knowledge of the return and the falsity thereof and the filing with intent to evade tax (R. 2662).

The court stated that good faith was a complete defense and cautioned about bona fide mistakes and required a specific wrongful intent "as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable" (R. 2662-2663), and then cautioned, "Likewise, NEGLIGENCE or CARELESSNESS in handling books of account, in providing information to be used in preparing income tax returns, or in handling busi-

ness affairs is not equivalent to fraud with intent to evade tax." (Our emphasis) (R. 2663).

Again the court cautioned: "It is not necessary to prove that the tax due was actually evaded but it is necessary to prove that there was a WILLFUL and POSITIVE ATTEMPT TO EVADE THE TAX in any manner or to defeat it by any means." (Our emphasis) (R. 2661).

These instructions cover thirty pages of the printed record. Evasion was referred to twenty-one times, and the court cautioned about willfulness sixteen times and mentioned knowledge and intent forty times. From this repetition it must be apparent that there was no doubt the jury had the issues clearly defined. The defendants are always entitled to fair instructions and such were given, and any questioned wording is surrounded by clear and positive language requiring SPECIFIC INTENT TO EVADE AS AN ESSENTIAL ELEMENT. No court is required to conform to a fixed formula of wording, nor is a defendant entitled to lift out of context isolated paragraphs of a charge as the basis of error.

A review of the instructions makes it difficult to visualize how the court could have more clearly made willfulness an essential element in the crime of tax evasion. The instructions should be considered as a whole, because set forth therein the element of will-

fulness is inextricably entwined with specific intent to evade known taxes, and an isolated paragraph could not affect them.

We cite a recent case, yet unreported, decided by the Sixth Circuit December 22, 1955, in which it was said:

> "The court's instructions with respect to this testimony contained no incorrect statement of law or fact; it is objected to only because it denominated appellant's conduct, if Bruns were believed, as 'wrongful and criminal,' and might, therefore, in effect, cause the jury to find appellant guilty of a crime for which she had not been indicted. Viewed against the context of the instructions as a whole, we think that the court's language could not have misled the jury in the respect charged." *Cottingham v. U. S.*, 54 U.S.T.C. 338.

ADDITIONAL OR SUPPLEMENTAL INSTRUCTIONS

The appellant assumes that before the supplemental instruction was given it was obvious that the jury at that time had not agreed on a verdict as to any of the defendants, and assumes that the instruction resulted in a conviction of the appellant. If one were able to go outside the record, the answer to that fact would be otherwise. There were three defendants and ten hours after the supplemental instruction, the jury returned a verdict acquitting defendants Erickson and Taylor. The jury had been deliberating when

they asked for the supplemental instruction. They did not ask that complete instructions be read but confined themselves to a single request. The court complied. If the jury desired "good faith" or "mistake" instructions, it can be assumed it would have requested them in the supplemental instructions. The lower court referred to the previous instruction that the acts charged in the Indictment were alleged to have been done willfully and knowingly and that those acts to be actionable must have been done voluntarily and purposely and with a specific intent to do what the law forbids with bad faith and an evil motive (R. 2674). By specific reference, therefore, the court advised concerning the test of intent necessary to support conviction of the crimes charged, not of some unrelated or unmentioned crime. Similarly, all references concerning specific intent, knowledge of and purpose to violate the law, reckless disregard of the law, and willfulness as used in a criminal statute can be considered to refer only to the criminal statute or the law which the jury had been advised applied to this case. It is an extremely far-fetched argument to suggest that the failure to repeat *ad infinitum* the identity of the statute involved and the nature of the crime under consideration is error.

Bollenbach v. U. S., 326 U. S. 607, relied on by the appellant, does not give support. In that case the

jury reported it was "hopelessly deadlocked." One juror asked a vital question which the court failed to answer, and the jury returned again in twenty minutes for further instructions. Defense counsel then objected to the court's failure to answer. The court refused other defense requests and gave an equivocal instruction, and five minutes later the jury returned the verdict. The decision of reversal was not unanimous, but the quick time element of the verdict apparently influenced the decision.

The cases cited by the appellant as following the *Bollenbach* decision are not on the supplemental instruction phase but on equivocal instructions and will not further be discussed.

"KACHLEIN AFFAIR"

We might well quote Judge Lemmon's observation in *Mitchell v. U. S.*, 213 F. 2d 951-953 as an answer to this claimed error:

> "It is familiar technique for an appellant to seize upon every peccadillo committed by the lower court and magnify it until it becomes a blunder of major proportions."

This is demonstrated on pages 70-71 of the appellant's brief where the words "conspiracy" and "framed" are recklessly used. In his opening statement counsel for Taylor said he would submit

"a series of circumstances which I would like now to summarize for you" (R. 87), and he did — and all the things he stated, he proved — and the record itself abundantly shows and the appellant's brief confirms that Forster tried to make Taylor the scapegoat for his derelictions, and still does.

Each of the eight points referred to in the appellant's brief (P. 70-90) was established by proof. As a matter of fact there was little disagreement as to what had occurred. A difference arose as to the construction to be placed upon such activities. The Government in the preparation of the case concluded that all three defendants had worked in unison and were each guilty of the attempted evasion and that they all should be tried together because separate trials would result in confusion of issues and attempts to shift culpability.

On January 6, 1954, three weeks before the trial of the case, co-defendant Taylor moved for severance and supported it by affidavit in which he recited that, in a trial with Forster and Erickson, the proof would show a strong case against them. Forster had inserted in the newspapers various statements emphasizing Taylor's personal plea of guilty to income tax evasion and his troubles resulted from his alliance with Taylor. Taylor in his affidavit referred to an

"artful campaign" by Erickson and Forster "to fix upon him responsibility for their own acts." (R. 10-15)

At that time George Kachlein, who had been the attorney for Taylor in his personal tax difficulties, knew that the defenses of Forster and Taylor were to be hostile. In this setting, counsel for the appellant stated to the court he opposed Taylor's motion for severance, and if the court intended favorably to consider it, he desired to be heard (R. 2788-2790). It would appear that Mr. Kachlein and all counsel for the appellant believed that the proof of Taylor's "sloppy bookkeeping" could be their defense. It is to be noted that after Kachlein withdrew as counsel he remained in attendance at the counsel table and testified as a witness on behalf of Forster. Kachlein was Taylor's attorney when he met with the agents on April 25, 1950, in connection with Forster's tax matters. He made the statement that if errors were made "it was undoubtedly due to the sloppy accounting work of Mr. Hicks Taylor" (R. 354-355). Kachlein knew of possible fraud action in August 1950 (R. 2516-2517). Forster employed Kachlein at the end of March 1950 (R. 1356). Kachlein and Forster went to Washington, D. C. about taxes (R. 1426), and Kachlein did not advise after April 25, 1950, that there was any conflict of interest (R. 1597-1598). Taylor's work sheets were in Forster's possession and Kachlein did not tell Taylor

he was delivering Taylor's work papers to the agents (R. 1614). During this period Taylor was in prison and thought Kachlein was representing him until October. Counsel for Forster stipulated in open court that Kachlein represented Taylor until October 27, 1950 (R. 1608).

There is a wide difference between representing parties in civil matters and finding a conflict of interest, and a much stricter standard is required when a criminal case involves two clients with conflicting interests, and more certainly when one becomes counsel for one of the defendants and a witness in his behalf.

The record shows that during the opening statement of Taylor's counsel, no objection was made to his remarks by appellant's counsel nor request made that it be restricted or disregarded. The court denied the motion for mistrial, and had for the protection of the defendants previously made an extended statement stressing that opening statements were not evidence of any kind (R. 92). The Government took the position from the beginning that these matters were immaterial, and the court instructed the jury that the matter was an issue between Taylor and Forster, and no part was introduced by the Government (R. 2437). Throughout, the Government objected to the introduction of such evidence (R. 2451,

2479-2481, 2498), and at the conclusion the Government moved to strike.

> "Mr. Moriarty: At this time the Government moves to strike the testimony of Mr. Kachlein as immaterial and irrelevant and under the position that the Government has taken we indulge in no cross examination."

Again:

> "The Court: The Government, in view of their position waives cross examination.
>
> "Mr. Moriarty: No interest in the controversy." (R. 2509)

The Government in its closing argument endeavored to clarify the matter when it was stated:

> "This Exhibit, A-142, was put into evidence during the side show about the Kachlein episode, in which we have at all times and do now disavow any connection with and have no part in, * * *" (R. 2642)

It is apparent here that the Forster defense wished Taylor in the case for their own purposes. They opposed the severance in the first instance and did not join Taylor's counsel during the other times when he urged it throughout the trial. They knew at the outset there was a conflict and while Taylor on October 25, 1950, had released Kachlein in civil matters to Forster, when the indictment was returned Kachlein knew that the defense of Forster had to be an attack on Taylor.

Kachlein could have withdrawn then, but for reasons of his own, remained. A dual interest was present in the civil matters between Taylor and Forster and it surely became a more delicate matter in the criminal proceedings.

By counsel's own action, he invited the situation. Taylor in this plight had no alternative but to present the facts, for what more powerful argument could have been made by Forster than that Taylor's own attorney had turned against him and in the criminal proceeding had espoused the cause of the co-defendand and was to be his witness.

There was no substantial conflict on the facts in the Kachlein affair and it was part of the picture. No harm was done to the appellant by its exposition. The Government took no part in the proceeding and urged its exclusion.

The incompetency of Taylor's accounting had been fully reviewed by the appellant's experts and all of the Taylor-Kachlein relationship had been exhaustively examined. The record fails to show any prejudice and, in fact, the appellant argues in his brief the proof vindicated Kachlein.

In the closing arguments the Court permitted counsel for the appellant one-half hour after he had made his closing argument to answer Taylor's coun-

sel's contention about Kachlein. Every consideration was given to each of the contending parties to present this immaterial phase of the case, and if the charge was unfounded, as appellant claims, it should have redounded adversely to Taylor.

The prosecution did everything possible to elminate the Kachlein-Taylor relationship but it found its way in because of the peculiar circumstances of the case. The Appellate Court should seriously consider noting this error because, if it does, the door will be opened for skillful counsel to have a "conflict" arise between co-defendants and provide an "ace in the hole" for review on appeal.

REBUTTAL WITNESSES

We shall group together the answer to the appellant's arguments relative to rebuttal witnesses. The trial of the case was lengthy, lasting from January 29 to May 14, 1954. About four hundred exhibits were received in evidence and many witnesses testified. The printed record covers six volumes, and it is incomplete. The court permitted evidence of Forster's association with Taylor from 1928 through the years of the Indictment. Seventy thousand dollars was paid by the appellant to a firm of national certified public accountants for an audit and $60 a day was paid to a certified public accountant who remained through-

out the trial at the appellant's table to assist in the defense. Three certified public accountants testified in detail as to the inaccuracies of licensed public accountant Taylor's procedures. Bankers were called, and all of the rebuttal witness except Ellis had testified at length regarding the matter. Gorans, the accountant, had reviewed the books and found irreconcilable items and had referred to Finstad and Utgard digit "1" which concerned Egeness *in extenso* (R. 527-533). The Government had objected to this evidence as it merely demonstrated some inaccuracies on Finstad and Utgard's books and the issue before the jury was the amount received from Finstad and Utgard by Forster which was unrecorded. The Government's position was that inaccuracies were beside the question. Gorans had stated that if the records of Issaquah and Alpine dairies had been properly entered they would have reflected all the income (R. 600, 799).

Taylor had stated in his cross examination by appellant's counsel that he did not make the changes on Finstad's and Utgard's books and did not know they had been changed (R. 2113) and when pressed as to who added the figures answered, "I would say Mr. Egeness" (R. 2114-2115). That this was Taylor's guess is demonstrated in his testimony (R. 2116-2117). Taylor had already been rebutted once in connection with a collateral matter and these alterations had

been charged to him by Schneider in his testimony (R. 2765).

It is to be noted that the Renton Ice and Ice Cream Company and Finstad and Utgard's books were collateral matters. These companies were sources of income which came to Forster which was not reported by him or the Issaquah Creamery Company. Long prior to the offer of the impeachment testimony three certified public accountants had explored all of Taylor's working papers and the records [which items remained in the custody of Forster and his counsel up to the time of trial]. Gorans, in chief, had for days discussed minus cash and minus inventories and had expressed his opinion that it was not possible to have such items. He carefully avoided in the seventy thousand dollar audit testimony anything about the unrecorded income in Exhibit 55, Account No. 198 — the personal savings account of Hans Forster (R. 571). He admitted that there was an account to which Forster's drawings for personal expenses could be charged (R. 591).

Throughout the trial Taylor's work had been the subject of corrections and counsel had twenty-one pages of the record about a 1932 audit, which was nearly fifteen years prior to the indictment. Taylor also gave an explanation of minus inventory (R. 2088-2089) and an explanation of minus cash. Taylor, during his examination, freely admitted the manipulation of cash

items and that they did not mean cash on hand (R. 1958-1971, 2003-2007, 2286-2290). Under cross examination he explained how he shifted accounts receivable into cash (R. 2286-2290) and that two statements issued on the same day to banks differed in cash in the sum of $8410.79 (R. 1960-1961), explaining they were for credit purposes. Taylor finally admitted to appellant's counsel that balance sheets tell "many stories" (R. 1981).

Phillip Strack, Forster's banker, testified in chief. He was called back in rebuttal to answer a question set forth on page 54 of appellant's brief. In support of the argument that he should be allowed to express an opinion, counsel refers to exhibits which were dated in 1933 and 1934 and the reading of the question propounded calls merely for an opinion and does not call for a factual answer. What Taylor meant by "cash" had been laid bare before the jury. Mr. Strack's statement that he would not have relied on a financial statement if another statement was outstanding, would be merely an expression of his opinion, and what is meant by "cash" was understandable by the jury. What was there to rebut?

Donaldson, Forster's banker, in his direct testimony discussed the financial statements for the indictment period (Ex. 121-130, R. 2677-2692) and had reviewed them with Forster and Taylor, including the

1949 statement, and identified Exhibit 134 as a statement prepared from information supplied by Forster when Taylor was not present (R. 2697). He further had testified that monthly statements were sent to Forster at Issaquah (R. 2712) and averred that Forster understood cash on hand and accounts receivable and other items (R. 2715-2716) and that the bank knew he had a savings account at Issaquah. The question addressed to Mr. Donaldson, in part reading, "What significance is there to you of the entry cash on hand and in the banks," in the light of the record means little. A jury must be presumed to know the plain import of simple English and they did not need the advice of Forster's bankers. Forster's certified public accountants had taken care of that long before and such testimony could not help Forster's defense.

The Egeness rebuttal would have added nothing to the case but confusion. It was a collateral matter about alterations on the books of Finstad and Utgard which were not pertinent. Egeness had testified in chief and the opportunity had been afforded to inquire into these matters. The court rather completely eliminated Finstad and Utgard from consideration in its final charge to the jury (R. 2656-2657), but in any event, the gist of the offense was not whether Egeness or Taylor had altered the books of Finstad and Utgard,

but whether Forster had evaded taxes and Taylor had assisted him.

The proffered rebuttal by Quentin Ellis is a unique attempt to allege error, and the assertion that knowledge on Taylor's part of Forster's savings account was a vital issue strains the imagination.

The argument in its entirety loses sight of the manipulations at Issaquah. Taylor's knowledge of it merely implicated him further in the scheme. It did not free Forster from responsibility. It would seem that the testimony of Ellis could have been put on by Forster as a part of his case but he elected not to do so, and then in the closing days of the trial desperately attempted to destroy Taylor by any means.

When counsel for the appellant cross examined Taylor and asked if Ellis was the man Taylor talked to, Taylor stated he did not recollect — it was not clear in his mind (R. 2124-25), and when further pressed, stated that he had some 35 or 30 accounts that went through the bank and it was pretty hard to single out to whom he had talked (R. 2130). All of the foregoing matters occurred on cross examination in the closing days of the trial. It was conceded it was not in rebuttal of the Government's case and Ellis was allowed, over objection of Taylor's counsel, to relate that he had discussed with Taylor the financial statements (R. 2404).

A reading of the discussion by counsel and the court (R. 2404 - 2412) should be interesting. The defense had a mystery witness which they wished to use. Taylor had not been able to identify whom he had talked to but Forster's defense produced one Ellis. His testimony could give no answer to the Government's case. It would not have helped Forster a bit, but if Taylor knew there was such an account, it would have tended to involve him further, if possible. Forster received the money and did not report it, and whether Taylor or Egeness altered the books did not mean a thing because the alterations did not affect the receipt by Forster of the funds. The court's ruling in effect closed further examination on a collateral matter which did not concern tax evasion and kept the real issue before the jury.

THE BLOCH CASE

Were it not for the decision in *Bloch v. U. S.*, 221 F. 2d 786, the appellant's points on pages 16 to 48 of the brief would be without merit. We do not propose to burden the Court with extended discussion of the *Bloch* case and its predecessors and successors. The *Bloch* case has been ably analyzed by more capable counsel and at present there is pending an *en banc* hearing in *Herzog v. U. S.* 226 F. 2d 561, in which the instructions on willfulness will be further examined. It

is sufficient to say that the *Bloch* case was decided *sua sponte;* that it ignored the previous holdings of the court and has not been followed in later decisions. Expressions of disagreement and intimations of *sub silentio* overruling it, have been observed at pages 567 and 570, *Herzog, supra.*

The instruction in the instant case has a marked distinction from the *Bloch* case in that it does not use the words "careless disregard," eliminates "negligence," and substitutes in place thereof "reckless disregard" (R. 2675), which indicates something far beyond negligence such as rashness, unrestraint, complete indifference to duty.

Reckless action supplies specific intent even in homicide cases. It becomes increasingly apparent that an individual word cannot of itself completely define the entire charge. It is not intended to, and this appears to be a parting point in the *Bloch* case.

We discuss briefly some of the appellant's citations.

In *Hargrove v. U. S.*, 67 F. 2d 820, 823, the Court made this statement:

> "A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law."

U. S. v. Martell, 199 F. 2d 670, contains this statement:

> "Strangely enough, members of the jury, there is no wilfulness needed in an income tax case."

Morissette v. U. S., 342 U. S. 246, cannot give substance to the propriety of the use of willfulness because that case involved a theft of Government property which the defendant claimed was abandoned, and the Supreme Court quite properly held that the trial court was in error when it refused to permit the defense to show the defendant thought it was abandoned property and instructed the jury:

> "He had no right to take this property * * * [A]nd it is no defense to claim that it was abandoned, because it was on private property."

This Court in *Legatos v. U. S.*, 222 F. 2d 678, 685-687, observed the *Morissette* case has no standing as an authority in an evasion case for the court there instructed that intent was not an element of the offense.

In *Friedberg v. U. S.* (1954) 348 U. S. 142, the Supreme Court gave tacit approval to the *Murdock* rationale:

> "The Court instructs you that the word 'wilfully' means not only intentionally or knowingly, but done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, and perverse-

> ly." (Instruction set forth at 53-2 U.S.T.C. par 9631)

This conviction had been affirmed in *Friedberg v. U. S.*, (6th Cir.) 207 F. 2d 777, and the Court said:

> "* * * the Court delivered to the jury a clear and correct charge, in which the rights of appellant were fully protected with extreme care, * * *"

Bateman v. U. S., (9th Cir. 1954) 212 F. 2d 61 on the questioned definition, the Court said at page 70:

> "As often occurs counsel has singled out one instruction in claiming error without regard to the instructions considered as a whole. The instructions on intent, given by the Court, correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

The same instruction (page 140 of its record on appeal) was given in the case of *Remmer v. U. S.*, 205 F. 2d 277, 290, and the Court said:

> "* * * instructions given fully protected the rights of the appellant."

CONCLUSION

The appellee respectfully submits that the instructions were correct, the appellant was not prejudiced by any occurrence at the trial and was convicted on substantial evidence. The judgment of the court below should be sustained.

CHARLES P. MORIARTY
United States Attorney
Attorney for Appellee

No. 14656

United States Court of Appeals
For the Ninth Circuit

Hans Forster, *Appellant,*

vs.

United States of America, *Appellee.*

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

REPLY BRIEF OF APPELLANT

Tracy E. Griffin,
J. Kenneth Brody,
Attorneys for Appellant.

603 Central Building,
Seattle 4, Washington.

The Argus Press, Seattle

FILE
MAR 21 1956
PAUL P. O'BRIEN, C

No. 14656

United States Court of Appeals
For the Ninth Circuit

HANS FORSTER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

TRACY E. GRIFFIN,
J. KENNETH BRODY,
Attorneys for Appellant.

603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Page

Questions Presented 1

"Counter-Statement of the Case" and "Evidence of Forster Evasion" 1

Reply Argument 2

I. The supplemental instruction to the jury was erroneous 2

II. The "Kachlein Affair" should have been excluded from the trial 5

III. Appellant's offered rebuttal testimony was erroneously rejected 9

IV. The errors committed by the trial court were prejudicial to appellant 12

Conclusion 15

Appendix 17

TABLE OF CASES

Bloch v. United States (C.A. 9, 1955) 223 F.(2d) 297 .... 3, 4, 5

Bollenbach v. United States, 326 U.S. 607, 90 L.Ed. 350, 66 S.Ct. 402 .... 3, 12, 14

Friedberg v. United States (C.A. 6, 1953) 207 F.(2d) 777 5

Friedberg v. United States, 348 U.S. 142, 99 L.Ed. 188, 75 S.Ct. 138 .... 4, 5

Hargrove v. United States (C.A. 5, 1933) 67 F.(2d) 820 4

Herzog v. United States (C.A. 9, 1955) 226 F.(2d) 561 3

Kotteakos v. United States, 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 129 12

Legatos v. United States (C.A. 9, 1955) 222 F.(2d) 678 4

Morrisette v. United States, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 4

Remmer v. United States (C.A. 9, 1953) 205 F.(2d) 277 5

United States v. Martell (C.A. 3, 1952) 199 F.(2d) 670 4

United States v. Murdock, 290 U.S. 389 .... 4, 5, 14

TEXTBOOKS

Page

Wigmore on Evidence, 3rd Edition, 1940
Section 29(a) 7
Section 36 10

COURT RULES

Federal Rules of Criminal Procedure, 18 U.S.C.
30 3
52(a) 12
52(b) 4

United States Court of Appeals
For the Ninth Circuit

HANS FORSTER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*		No. 14656

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

QUESTIONS PRESENTED

The issues on this appeal are framed by the Specification of Errors set forth in appellant's brief. The second and third questions stated by appellee on pages 1 and 2 of his brief are not questions raised by this appeal. They do not relate to any order or ruling to which appellant objects as having introduced error into the record below. The statement of these questions can only be an attempt to induce this Court to decide this appeal upon its view of the evidence, rather than upon the issues which the appellant has brought before it.

"COUNTER-STATEMENT OF THE CASE" AND "EVIDENCE OF FORSTER EVASION"

These phases of the appellee's brief do not go to the specific issues raised on this appeal. The only possible purpose of this summation of the evidence is an attempt to show that the evidence of appellant's guilt

was so overwhelming that the errors assigned by the appellant were not prejudicial.

Appellant's view of the evidence differs sharply from that of appellee. We believe that the record contains substantial evidence of lack of any willfulness on the part of appellant. To the extent that it is necessary to review the evidence to determine if the claimed errors were prejudicial, appellant has done so in his opening brief.

It would, however, be unfair to the appellant to leave unchallenged many of the statements and omissions contained in appellee's summation of the evidence. Therefore, appellant's view of this evidence is contained in the Appendix to this brief insofar as it is not directly germane to the issues raised by this appeal.

REPLY ARGUMENT

I. The Supplemental Instruction to the Jury Was Erroneous

Appellant does not dissent from the comments of appellee upon the trial court's instructions as set forth in pages 15-17 of his brief. Appellant does not appeal from any matter contained in the *original instructions.* The heart of this appeal is the *additional instruction* on the subject of willfulness which was given at the special request of the jury and which appellant, upon the authorities stated in his opening brief, believes to be erroneous.

Appellant does take issue with appellee's statement (appellee's brief, p. 17) that "The instructions should be considered as a whole * * *" for the reasons set forth

in Mr. Justice Frankfurter's opinion in the case of *Bollenbach v. United States,* 326 U.S. 607. Moreover, as appellant has stated in his opening brief, the error in the instant case is greater than that in the *Bollenbach* case because the trial judge made it plain that by the additional instruction he was giving to the jury a separate, independent and alternative standard by which the jury might decide the issue before them. This, in effect, constituted a direction by the trial court to disregard the previous instructions if the jury found the additional instruction easier to use.

Appellee attempts to distinguish the *Bollenbach* decision on the ground that the trial court there gave "an equivocal instruction." He states that the cases cited by appellant as following the *Bollenbach* decision " * * * are not on the supplemental instruction phase but on equivocal instructions * * * " (appellee's brief, p. 20).

The distinction, if there be one, favors the appellant. For the supplemental instruction given by the trial court was not only "equivocal," but in fact has been held by this court to be "plain error." *Bloch v. United States* (C.A. 9, 1955) 223 F.2d 297.

As noted at pages 43 and 92 of appellant's brief, *Herzog v. United States* (C.A. 9, 1955) 226 F.2d 561, did not overrule the substantive aspect of the *Bloch* cases. The question there was procedural and this court held that an appellant who has not taken exception to a portion of the charge, as required by the Federal Rule of Criminal Procedure 30, may not assign that

portion of the charge as error under the provisions of Federal Rule of Criminal Procedure 52(b).

Appellee has failed to distinguish the language complained of in the additional instruction before this court from that used in the *Bloch* case. The word "negligence" is not used in the *Bloch* instruction as stated by appellee on page 33 of his brief. In fact, the *Bloch* instruction which this court held to be "plain error" was less damaging than the additional instruction in this case since it did not include the dubious words "stubbornly, obstinately, perversely." Such words do not measure up to the criterion of the felony of tax evasion: the specific wrongful intent to evade a known tax obligation.

It must be pointed out that the appellee's citations from *Hargrove v. United States* (C.A. 5, 1933) 67 F.2d 820, and *United States v. Martell* (C.A. 3, 1952) 199 F. 2d 670, are in each case taken from the decision of the trial court which was reversed on appeal. Both cases are correctly cited in the brief of appellant at pages 34-35.

Appellant does not rely upon the case of *Morissette v. United States,* 342 U.S. 246. The issue in that case was an erroneous instruction the matter of presumption and the case is cited in the brief of appellant only because it is fundamental to the decision in *Legatos v. United States* (C.A. 9, 1955) 222 F.2d 678, wherein the *Murdock* instruction (see footnote 3, page 22, appellant's brief) was also used.

Appellee cites the case of *Friedberg v. United States,* 348 U.S. 142, as lending approval to the use of the *Mur-*

dock instruction. Only a portion of the *Murdock* instruction was there used; elements are specifically omitted which this Court found to be erroneous in its decision in the *Bloch* case.[1] Moreover, there was no exception by appellant to this portion of the charge and it does not appear that this instruction was raised or argued on appeal. Indeed, the opinion in the Court of Appeals (C.A. 6, 1953) 207 F.2d 777, shows "no exception being taken to the charge."

The same is true of *Remmer v. United States* (C.A. 9, 1953) 205 F.2d 277, where it appears that the use of this instruction was not one of the issues raised on appeal, argued or determined by this Court.

Appellant contends that the brief of appellee has in no way met appellant's basic argument on this phase of the case: That the *Murdock* language has been declared erroneous by this Court in the *Bloch* case; that the giving of the additional, separate and erroneous instruction on willfulness at the special request of the jury was prejudicial error.

II. The "Kachlein Affair" Should Have Been Excluded From the Trial

Appellee's brief firmly substantiates the argument contained in the brief of appellant that the introduc-

---

[1]This language, declared erroneous in the *Bloch* case, was not used in the *Friedberg* case: "It [willfulness] includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act." Such language was used in the additional instruction assigned as error in the instant case.

tion of this issue into the trial was erroneous. The Government's position, as indicated by the brief of appellee, is that this issue was immaterial and irrelevant. Thus, appellee states, at page 23 of his brief, that:

> "The Government took the position from the beginning that these matters were immaterial * * * "

Page 24 contains Mr. Moriarty's statement, in support of his motion to strike, that the testimony of Kachlein was "immaterial and irrelevant."

Appellant contends, at page 25 of his brief, that:

> "The Government took no part in the proceeding and urged its exclusion."

And appellee concludes at page 26 of his brief that:

> "Every consideration was given to each of the contending parties to present *this immaterial phase of the case* * * * " (Emphasis supplied)

The fact that the Government took no interest in this issue does not expunge the error from the record. If the issue was irrelevant and immaterial, as contended by appellee, it was error to permit the jury to consider it.

The reasons for the exclusion of this evidence are plain. Materiality relates to the *"factum probandum"* or the proposition to be established in the case. Relevancy relates to the *"factum probans"* or the facts evidencing the proposition to be established. To state, as appellee has done, that the Kachlein issue is immaterial is to state that it is wholly outside of the propositions which were sought to be established by this case, *i.e.,* the guilt or innocence of the defendants. Once it is understood that immateriality imports a foreignness

to the propositions to be proved in a particular case, the reasons for the necessity of its exclusion are clear, as is the prejudice inherent in the admission of such testimony.

What is logically relevant may also be excluded on the grounds of practical policy. The reasons are set forth by Wigmore at § 29(a) of Wigmore on Evidence as follows:

> "For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability of his doing or not doing a particular act or crime, yet it may be excluded because of the *undue prejudice* liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character * * * Again, in proving the dangerous qualities of a place or a machine, repeated instances of its injurious operation would be of high probative value; yet the unrestricted admission of such instances might result in so multiplying the subordinate issues in a cause that *confusion of mind* would ensue and the main controversy would be lost sight of in the great mass of minor issues * * * "(Emphasis the author's)

No more brilliant example of the correctness of this policy can be found than in this case. For weeks at a time the attention of the jury was completely distracted from the principal propositions of the case to the admittedly immaterial issue of the Kachlein-Taylor relationship. Nothing could have more seriously prejudiced the appellant in the defense of a tax fraud case for this was an accusation of yet another fraudulent conspiracy.

Appellee contends that no harm was done to appellant by the exposition of this issue because appellant had every opportunity to present his side of the case. The harm to the appellant was not in the handling of the issue once it had been admitted, but in admitting it at all. Treatment of issues which are immaterial and irrelevant in the most scrupulously fair manner, cannot justify their initial entry into the record.

Appellee insists that after the indictment was returned, " * * * Kachlein could have withdrawn then, but for reasons of his own, remained" (appellee's brief, p. 25).

Kachlein's withdrawal could not have prevented Taylor's counsel from attempting to inject this issue into the case. For the so-called "issue" was in existence on the day that Taylor released Kachlein as his attorney. The solution to this problem was not the withdrawal of Kachlein but the withdrawal from the jury of this immaterial and irrelevant issue.

Appellee states that:

> "Forster employed Kachlein at the end of March, 1950 (R. 1356). Kachlein and Forster went to Washington, D.C., about taxes (R. 1426), and Kachlein did not advise after April 25, 1950, that there was any conflict of interest (R. 1597-1598)." (Appellee's brief, p. 22)

The inference is that Kachlein accompanied appellant to Washington, D.C., prior to April 25, 1950. The fact, as shown by the testimony of appellant (R. 1427-1428) is that he and Kachlein went to Washington in late 1950 or early 1951, clearly after Taylor had released Kachlein as his attorney.

The suggestion is contained at page 24 of appellee's brief that Taylor had released Kachlein on October 25, 1950, in "civil matters" only. We believe that the record is clear that on October 25, 1950, there was a total severance of the relationship of Taylor and Kachlein insofar as all of the affairs of appellant were concerned.

The appellee's concession that this issue was immaterial and irrelevant should lend strength to appellant's own argument on this phase of the case. The ultimate effect of this issue must have been upon the credibility of appellant, for Taylor was acquitted in spite of appellee's belief that there was more than sufficient evidence of Taylor's guilt and appellee's statement, at p. 12 of his brief, that:

> " * * * we think the record shows they [Taylor and Erickson] actively participated in the evasion."

III. Appellant's Offered Rebuttal Testimony Was Erroneously Rejected

The basic error in appellee's concept of the admissibility of the rejected rebuttal testimony upon which appellant assigns error arises from his viewpoint that the only issues in the case were those framed by the Government. In referring to the proffered rebuttal testimony of Egenes, appellee states, at page 27 of his brief:

> "The Government had objected to this evidence as it merely demonstrated some inaccuracies on Finstad and Utgard's books and the issue before the jury was the amount received from Finstad and Utgard by Forster which was unrecorded."

With respect to the proffered rebuttal testimony of Ellis, appellee states at page 31 of his brief:

> "The proffered rebuttal by Quentin Ellis is a unique attempt to allege error, and the assertion that knowledge on Taylor's part of Forster's savings account was a vital issue strains the imagination."

The proposition which the prosecution sought to prove was that the appellant, Taylor and Erickson, had acted jointly to evade the income taxes of appellant and of Issaquah Creamery Co. The proposition which the appellant sought to prove was that he had not willfully evaded tax and that he had relied in good faith upon his bookkeeping and accounting personnel. These issues raised by appellant were as valid as the issues submitted by the prosecution. The jury's decision was bound to rest upon the evidence adduced in support of the issues as framed by the various parties. If vital testimony in support of the issues raised by appellant was rejected, the effect was bound to be prejudicial. It should never be forgotten that the testimony of appellant and of Taylor was frequently in direct conflict; and that appellant was convicted and Taylor acquitted.

The principle upon which the admissibility of evidence in support of the issues raised by appellant rests is well stated in Wigmore on Evidence, at § 36:

> "It has thus been seen that every evidentiary fact or class of facts may call for two processes and raise two sets of questions: (1) the admissibility of the original fact from the proponent; (2) the admissibility of explanatory facts from the opponent.

> "(1) The first is subjected to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable interpretations of the fact * * *
>
> "(2) The second process consists in explaining away the original fact's force by showing the existence and probability of other hypotheses; for this purpose other facts affording such explanations are receivable from the opponent * * * "

Appellant has attempted carefully to analyze the significance of the offered rebuttal testimony in his opening brief (pages 47-70) and will not now attempt to repeat that analysis. It is sufficient to say that in each case the purpose of the testimony was two-fold: To show the commission of affirmative acts by Taylor indicative of his primary responsibility; and to show the utter want of credibility of Taylor's testimony.

Appellee's statement, at page 30 of his brief, that:

> "The court rather completely eliminated Finstad and Utgard from consideration in its final charge to the jury (R. 2656-2657) * * * "

is not factually correct. The trial court in that portion of the charge referred only to certain payments to Mary Finstad arising out of the contract for the purchase of the enterprise by appellant. Other matters at Finstad & Utgard were not excluded from the attention of the jury.

In summary, the offered rebuttal testimony went to the heart of the defense issues raised by the appellant. Whether Taylor was a practiced and habitual manipulator of financial statements, whether he had knowledge of the principal bank account in which the bulk of the unrecorded income was deposited and whether he

was responsible for certain alterations in the books of one of appellant's corporations were all vital to a true understanding of the role which Taylor played in appellant's affairs. Beyond that there was always at stake the issue of the credibility of Taylor. The rejection of this rebuttal testimony left the testimony of Taylor in those respects unchallenged; the verdict of the jury followed.

IV. The Errors Committed by the Trial Court Were Prejudicial to Appellant

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. at 294, 84 L.ed. 260, 60 S.Ct. 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos v. United States,* 328 U.S. 750, 764.

There should be little doubt that the errors complained of on this appeal had a substantial influence and were not harmless errors of the type condoned by Federal Rule of Criminal Procedure 52(a). That the

erroneous additional instruction on willfulness was prejudicial is made clear by the opinion in the *Bollenbach* case where the court said:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks * * *
>
> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelled out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must, therefore, be disregarded. [February 26, 1919] 40 Stat 1181, c 48, 28 USCA §391, 8 FCA title 28, § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical

> errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency." 326 U.S. 613-615.

When this Court, on petition for rehearing, reconsidered the effect of the *Murdock* instruction in the *Bloch* case, it based its holding upon the *Bollenbach* decision:

> "The instruction with which we are concerned goes to the intent, an essential element of the offense. This is not a case of instructions which are merely ambiguous or confusing or where conflicting instructions deal only with incidental matters in the trial. As stated in Bollenbach v. United States, 326 U.S. 607, 613, 66 S.Ct. 402, 405, 90 L.ed. 350, 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' It is with that in mind that we have come to the conclusion that in this particular case, in the light of the specific instructions here given, we cannot say as was said in Bateman and Legatos that the instruction here involved was not prejudicially erroneous."

The numerous authorities indicating the prejudicial effect of introducing into this case the so-called "Kachlein Issue" are found in pages 83-88 of appellant's brief. And the prejudicial effect of the rejection of appellant's proffered rebuttal testimony is best shown by a consideration of the purposes for which it was offered as shown in the appellant's opening brief and in this reply brief and the result which followed its rejection.

CONCLUSION

For the reasons stated, the judgment of guilty as to the appellant should be reversed and the cause remanded for new trial.

Respectfully submitted,

TRACY E. GRIFFIN
J. KENNETH BRODY
Attorneys for Appellant.

APPENDIX

Certain additional references to the record should assist in correcting the impressions created by those facts selected by appellee in his "Counterstatement of the Case" and "Evidence of Forster Evasion."

Appellant had nine years of formal schooling in Switzerland and had no bookkeeping or accounting training (R. 830). He served a two-year apprenticeship as a cheese maker (R. 832) before coming to the United States. When he acquired an interest in Issaquah Creamery Co., he maintained the then-existing bookkeeping and accounting arrangements (R. 859-860) which included the services of Taylor (R. 1510). Appellant was chiefly interested in the operating side of Issaquah Creamery Co. and various businesses which he later acquired, as distinguished from the accounting and financial aspects of those businesses. He instituted the production and sale of cottage cheese and ice cream mix and then developed a fresh milk distribution business in the City of Seattle (R. 861-870). This fresh milk operation later became Alpine Dairy (R. 881-886). Appellant was the chief salesman for all of his various operations. He built up the routes, including eventually 70 at Alpine Dairy and 45 at Apex Farms. He secured the jobbers and the basic wholesale customers of his businesses (R. 889). Arrangements for an adequate supply of milk were vital to this business; and appellant handled all of the relationships of his various businesses with the milk producers (R. 889, 922). Appellant was active in the field of labor relations (R. 923), and was chairman of the Labor Relations Committee of the Seattle Milk Dealers Association. Appellant was active in all phases of the dairy industry, serving as a director of the Washington State Dairy Council, the Washington State Dairy Foundation, the Seattle Dairy Foundation and the Northwest and Regional Milk In-

dustry Foundation. He served on committees of the National Milk Industry Foundation (R. 928-929).

Appellant was active in civic and community affairs, serving as a school district director and as a leader in community chest activities and the Boy Scouts of America (R. 928-930). To these varied activities appellant testified he devoted seven days a week, thirty days a month and 365 days of the year (R. 924).

All of these activities precluded a close acquaintance on the part of appellant with the bookkeeping and accounting operations of his businesses. Appellant testified that he was unfamiliar with the books at Simonson & Forster (R. 875), at Alpine Dairy (R. 886); that he never had occasion to examine the books and records of Renton Ice & Ice Cream Co. (R. 894); and that he had nothing to do with the arrangements for the distribution of salary checks at that concern (R. 896). Appellant testified that he did not know how the Finstad & Utgard purchase price had been set up and he did not know how payments were made to Mrs. Finstad (R. 900). Appellant testified that he was unfamiliar with the financial arrangements of the Daisy Ice Cream Co. (R. 904-905) and that Taylor set up and himself ran the bookkeeping and accounting operations of Arctic Gardens (R. 910-911). Appellant testified that Taylor kept the corporate records of Apex Farms while Keck was in charge of the books (R. 913).

Appellant explained that he watched the costs of his products and the sale prices in order to determine whether he was making a profit (R. 925). This constituted his guide to business policy rather than any detailed knowledge of accounting procedures. On the vital issue of expenditures charged to the various businesses, appellant testified that he did not personally know how these charges had been handled on the books (R. 935).

The ultimate fact was that appellant had never made an entry upon any of his books of account (R. 998), since he believed that all bookkeeping and accounting functions were being ably supervised by Taylor (R. 972). It is important to note that appellant was unable to make any distinction between Alpine Dairy, Issaquah Creamery and his own personal funds. He believed that these were interchangeable since these were wholly-owned enterprises (R. 1054-1055).

By way of contrast, Taylor was twice president of the Seattle Association of Licensed Public Accountants and twice president of the Washington State Association of Licensed Public Accountants (R. 1510). He maintained the general ledger of Issaquah Creamery Co. and prepared its tax returns (R. 1517-1526). He was secretary and a director of the company (R. 883). Taylor set up the books of Simonson & Forster, Inc., and was secretary-treasurer (R. 871-874). Taylor set up the books and bookkeeping department of Alpine Dairy (R. 881-887). Taylor set up the books and records of Renton Ice & Ice Cream Co. and was secretary and treasurer (R. 893-896). He performed the same function at Finstad & Utgard where he was secretary and treasurer (R. 896-901). Taylor was an incorporator of Arctic Gardens, Inc., was secretary-treasurer and ran the bookkeeping system (R. 909-911). Finally, Taylor supervised the accounting operations at Apex Farms, Inc., and was secretary-treasurer (R. 911-914). When, on several occasions, appellant asked Taylor if he desired additional accounting help, Taylor declined and "he advised them that everything was under control, and we didn't need any extra help" (R. 966-967).

It is important to note Taylor's intimate relationship to all of these enterprises in which appellant had an interest in order to understand Taylor's responsibility in the matter of intercorporate transactions. Tay-

lor made out all income tax returns which had ever been filed by appellant, by any member of appellant's family, or any corporation in which appellant had a working interest until Taylor's activities were terminated by his prison term (R. 969-971).

Appellee states that diversion of income was accomplished by appellant at Issaquah Creamery Co. "without any help from Taylor" (brief of appellee, p. 9) by means of the deposit of unrecorded receipts into Account 198, stating that "Taylor had nothing to do with this account * * * " (brief of appellee, p. 10). Yet, appellant testified that Taylor had detailed knowledge of Account 198 and the items which went into it as the result of frequent discussions (R. 1433-1434). As an example, appellant testified that he had discussed with Taylor those Time Oil Company rebates (R. 1100-1103) to which reference is made at pages 12-13 of the brief of appellee.

Reference is made at page 13 of appellee's brief to certain testimony of Caroline Neukirchen. The quotation appears in its complete form as follows:

> "A. He told me that I was not doing anything wrong; and that he asked me, 'Are you withholding money from me?'; and I said, 'No, I wasn't withholding any money'; and he said, 'Well, you are not doing anything wrong then'; and he says so far as the quotas go, it was just that these particular accounts did not have their quota and that was the reason he wanted me to withhold the accounts, to protect the customer." (R. 143-144)

The testimony of appellant shows clearly the motivation for the failure to record certain sales during a war-quota period. There was no violation of any Governmental law or regulation and the whole situation arose out of a desire to dispose equitably of certain

surplus production for which quotas had not been allotted (R. 947-950, 1121-1124). The tax evasion motive does not appear from the record.

Appellant makes much of the system for the distribution of salary at Renton Ice & Ice Cream Co. (brief of appellant, pp. 13-14) leaving the impression that this was a situation created by appellant. To the contrary, the testimony of Schneider, the president of Renton Ice & Ice Cream Co., makes it clear that on every occasion he acted under the instructions of Taylor (R. 2726, 2729, 2731, 2732, 2734, 2737, 2744, 2747, 2748, 2750, 2754, 2755); and finally Schneider testified that he personally saw Taylor alter the accounts payable ledger of Renton Ice & Ice Cream Co. (R. 2765).

Appellee states (appellee's brief, p. 11) that at a 1950 meeting "Forster had complained about the profits [of 1949]." This was related to the alteration of 1949 accounts payable.

Appellant's testimony (R. 965, 1002) shows that he did not complain that the profit was too high for tax reporting purposes, but that he believed the figures were inaccurate and unrealistic in the light of the business experience of past years.

No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

FILED

MAY 14 1955

PAUL P. O'BRIEN, CLERK

NORMAN N. GRIFFITH,
904 Yeon Building,
Portland 4, Oregon,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-55

SUBJECT INDEX

Page

Jurisdictional Statement 1

Statement of the Case 2

Specifications of Error 6

Specification of Error No. I 6

Specification of Error No. II 7

Specification of Error No. III 7

Specification of Error No. IV 8

Specification of Error No. V 8

Summary of Argument 9

Argument: Specifications of Error I, II and III 11

A. Executive Order No. 7672 legally describes the land in question and expressly provides that it is open to mineral entry 11

B. Executive Order No. 7672 was used by the President under the authority of the Withdrawal Act and that act required the land withdrawn to remain open to mineral entry 17

President has inherent power to withdraw land from entry but here he acted under his statutory powers 19

C. The Attorney General of the United States construes a statutory withdrawal order such as Executive Order No. 7672, as leaving the land open to mineral entry 20

D. This case may be decided upon the basis of the construction of Executive Order No. 7672 without deciding the abstract question whether acquired land is always open to mineral entry 23

E. Executive Order No. 7672 is the controlling executive order insofar as the land in question is concerned 25

Page

F. Congress intended the term "lands belonging to the United States" in the mining laws of the United States to cover "acquired" land 28

1. The legislative history of the mining laws and a comparative analysis of other statutes demonstrate that 28, 29

2. Congress was aware of the problem of acquired lands when it enacted the mining laws 30

Acquired lands are an old problem 30

The case law supports the application of 30 U.S.C. sec. 22 to acquired lands 31

G. Congress has not passed any special legislation withdrawing the land involved here from mineral entry 36

H. The court below has read distinctions into 30 U.S.C. sec. 22 which were not placed there by Congress and in so doing has defeated the liberal purpose of the mining laws 38

Argument: Specification of Error IV 41

Point: Any alleged determination of mineral character of the land prior to acquisition thereof by the United States in 1937 is immaterial 41

Argument: Specification of Error V 43

Point: There was a total absence of evidence that Executive Order No. 7908 applies to the particular land involved here 43

Conclusion 43

TABLE OF CASES

Page

Botiller v. Dominguez, 130 U.S. 238, 32 L. Ed. 925, 9 Sup. Ct. 525 ... 30

Lockhart v. Johnson, 181 U.S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979 ... 35

Mason v. United States, 260 U.S. 544, 43 Sup. Ct. 200, 67 L. Ed. 396 ... 18, 19

Murphy v. State, 65 Ariz. 338, 181 P. 2d 336 ... 33

Oklahoma v. Texas, 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406 ... 33, 34

Sioux Tribe v. United States, 316 U.S. 317, 325, 86 L. Ed. 1501, 63 Sup. Ct. 1095 ... 19

United States v. Holliday, 24 F. Supp. 112 ... 33

United States v. Ickes, 98 F. 2d 271, 279, cert. den. 305 U.S. 619, 59 Sup. Ct. 80, 83 L. Ed. 395 ... 40

United States v. Midwest Oil Company, 236 U.S. 459, 59 L. Ed. 673, 35 Sup. Ct. 309 ... 19

Verdier v. Railroad Company, 15 South Carolina 476 ... 31, 32, 33

STATUTES

Page

Act of March 3, 1851, 9 Stat. 631 31
Act of June 7, 1862, 12 Stat. 422 31-32
Act of July 26, 1866, 14 Stat. 251 .... 29, 32
Act of May 10, 1872, 17 Stat. 91 .... 29, 32, 39
36 Stat. 847, as amended, 37 Stat. 497, 43 U.S.C. secs. 141 and 142 .... 9, 17, 18, 19, 21, 39
39 Stat. 344, 43 U.S.C. sec. 153 30
Act of February 25, 1920, 41 Stat. 437 36
Act of March 3, 1927, c. 318, 44 Stat. 1359 27
Emergency Relief Appropriations Act of 1935, 49 Stat. 115 .... 4, 13, 25, 35
50 Stat. 522, 7 U.S.C. sec 1001 et seq. 25
Act of August 7, 1947, c. 513, § 9, 61 Stat. 915, 30 U.S.C. sec. 351 et seq. 36, 37
28 U.S.C. sec. 1291 2
28 U.S.C. sec. 1345 2
30 U.S.C. sec. 22 2, 10, 28, 29, 30, 31, 33, 34, 36, 38, 40, 43
30 F.C.A. sec. 22, explanatory note 36
43 U.S.C.A. sec. 142, historical note 18

EXECUTIVE ORDERS

Executive Order No. 6910 .... 13, 26
Executive Order No. 7672 .... 5, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 35, 39, 40
Executive Order No. 7908 .... 8, 25, 26, 27, 43

MISCELLANEOUS AUTHORITIES

40 Op. A.G. 73 .... 20, 21, 22, 39
43 Words & Phrases, Perm. Ed. p. 635, p. 29, Supp. p. 12, p. 383 15
50 Har. L. Rev. 897 39
U. S. Code Congressional Service, 80th Congress, 1st Session 1947, p. 1662 37

No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

Sam D. Rawson claims a mining claim upon certain lands belonging to the United States. Pre-Trial Order, R. 5, 6, 10-12. The United States brought this action to declare the mining claim void and to enjoin alleged trespasses on the government land concerned. Pre-Trial Order, R. 9-10. A final judgment declaring the mining claim null and void was rendered by the District Court. R. 50.

The District Court had jurisdiction by virtue of the fact that the United States is the party plaintiff: 28 U.S.C. sec. 1345. Pre-Trial Order, R. 3. This court has jurisdiction of this appeal under 28 U.S.C. sec. 1291.

The appeal involves the construction of, but not the validity of, 30 U.S.C. sec. 22:

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R.S. § 2319; February 25, 1920, ch. 85, § 1, 41 Stat. 437.)"

STATEMENT OF THE CASE

Sam D. Rawson located a mining claim in Jefferson County, Oregon. R. 6. The United States thereafter filed this action in the U. S. District Court for Oregon against him, claiming that his location was null and void and praying that he be enjoined from going on the claim and removing volcanic cinders therefrom, and for judgment for the value of the cinders removed. The action was tried before Solomon, J., who after entering findings of fact and conclusions of law, entered a judgment thereon declaring appellant's mining claim null and void and granting the relief prayed for. Sam D. Rawson appeals from that judgment.

The basic facts in regard to appellant's mining claim are well stated in the agreed facts of the Pre-Trial Order. Appellant's 20-acre claim was located on Round Butte, "a clearly visible mound of volcanic cinders", rising about 600 feet above the surrounding countryside. R. 5.

Paragraph V of the Agreed Facts continues:

> "The cinders of which this mound is composed, consist principally of silicon, aluminum, potassium, sodium, iron, calcium and magnesium. These cinders are commercially valuable for road surfacing, highway construction, building block material and other purposes. The cinders are not rock in place, as a lode, but are in the form of a placer deposit and said deposit of cinders has a commercial value."

There was also uncontradicted evidence at the trial as to the mineral content of these cinders and that they have a commercial value and are salable. R. 66, 63.

It was also an agreed fact as to the twenty acres upon which the claim was located that:

> "a physical examination thereof indicates that said 20-acre tract is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface. Said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." R. 6.

There was also uncontradicted testimony at the trial that this land upon which the claim was filed was known to be mineral before the appellee ever issued any homestead patent thereto. R. 63.

Finally the facts as to the locating of the claim were agreed to:

> "On February 17, 1951, the defendant, Sam D. Rawson, having discovered the mineral deposit of cinders on said 20 acres, posted a notice of location of a 20 acre claim described as the
>
> West Half (W ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of said Section 13,
>
> containing 20 acres more or less, in compliance with the provisions of the mining laws of the United States (30 U.S.C.A., Sections 21-52).) Said defendant was at said time a citizen of the United States and was over the age of 21 years and was a resident of Jefferson County, Oregon. Said defendant described said claim in said notice as the 'Luck Strike', and thereafter, the defendant filed a copy of said notice in the office of the County Clerk of Jefferson County, Oregon, and the defendant has since been in possession of said placer mining claim and claiming under the mineral laws of the United States. While in possession the defendant has made improvements upon and in connection with said claim of a value in excess of $500.00. While in possession, defendant has been and is presently going upon said lands within said claim and removing cinders therefrom." R. 6-7.

The land on which the said claim was located was purchased by the United States in 1937 with moneys appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. R. 4-5. The land was purchased for the purpose, among others, "of retiring submarginal land from agricultural use." R. 6.

The appellee contended below that appellant's mining claim was null and void simply because it was on "acquired" land, i. e., land which had once been

patented by the United States and afterwards bought back. See particularly appellee's Contentions VI, VII, VIII, and X. R. 10.

The court below agreed and entered two conclusions of law which stated:

"IV

"Such 20-acre tract is not in the public domain but is acquired land not subject to mineral entry.

"V

"Defendant's mining claim is null and void." R. 22.

The entry of those conclusions of law together with the judgment based thereon are the principal errors specified by the appellant. (Specifications of Error I, II and III). Essentially this appeal presents a single issue: was the land in question open to mineral entry in 1951?

The answer to that question depends upon the construction given the mining laws of the United States and to Executive Order No. 7672. The problem involved in the construction of the mining laws and, in particular, the phrase "lands belonging to the United States" found in 30 U.S.C., Sec. 22 pertains to all acquired lands of the United States. The construction to be placed on Executive Order No. 7672 pertains only to a certain area of land in Central Oregon.

SPECIFICATION OF ERRORS

Specification of Error No. I

The District Court erred in entering the Final Judgment and Order of Injunction of December 23, 1954, and in particular in ordering, adjudging and decreeing therein that:

> "Now, Therefore, It Is Ordered, Adjudged and Decreed that the corrected interlocutory judgment and order of injunction made and entered December 28, 1953, as of the 2nd day of January, 1953, concerning defendant's alleged mining claim covering the W ½ of the SW ¼ of the SE ¼ of Section 13, Township 11 South, Range 12 East, of the Willemette Meridian, in Jefferson County, Oregon, be and hereby is reaffirmed and re-entered this 23rd day of December, 1954, and is hereby made final insofar as it provides that the mining claim of the defendant, Sam D. Rawson, heretofore filed of record with the County Clerk of Jefferson County, Oregon, on February 17, 1951, is null and void and no force and effect, and that the defendant, Sam D. Rawson, his servants, employees, agents, contractors and representatives, and all other persons acting by or under his direction or authority or in concert or participation with him, be permanently enjoined and restrained from entering, trespassing, occupying, possessing or removing cinders from the tract of land hereinabove described, and
>
> "It Is Further Ordered, Adjudged and Decreed that the plaintiff have and recover from the defendant the sum of $120.00 damages for the removal of cinders from the land above described prior to the order of injunction herein." R. 50.

in that the land in question was open to mineral entry under the mining laws of the United States and Execu-

tive Order No. 7672 and the appellant has a valid mining claim thereon.

(This specification covers Appeal Points 1, 2, and 3. R. 53, 70).

Specification of Error No. II

The District Court erred in entering Conclusions of Law IV which states totidem verbis:

> "Such 20-acre tract is not in the public domain but is acquired land not subject to mineral entry." R. 22.

in that under the mining laws of the United States and the terms of Executive Order No. 7672, said tract was open to mineral entry though said tract was acquired land.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. III

The District Court erred in entering Conclusion of Law V. which states totidem verbis:

> "Dedendant's mining claim is null and void." R. 22.

in that appellant's claim was valid under the mining laws of the United States and the terms of Executive Order No. 7672, and said conclusion was based on the preceding Conclusion of Law No. IV, wherein it was erroneously concluded that acquired land is not open to mineral entry.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. IV

The District Coure erred in entering Conclusion of Law III which totidem verbis was:

> "The determination made by the land officers of the Department of the Interior on January 25, 1915, at the time it issued a homestead patent containing such tract, that such land was not mineral land is a conclusive determination of such fact insofar as the defendant is concerned." R. 22.

in that there has been no determination made by the land officers of the Department since the land in question was acquired by the United States.

(This specification covers part of Appeal Point 4. R. 54, 70).

Specification of Error No. V

The District Court erred in entering Finding of Fact 7 which states totidem verbis:

> "In June, 1938, pursuant to Executive Order 7908, the lands purchased pursuant to the Emergency Relief Appropriations Act of 1935 were transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Farm Tenant Act." R. 21.

in that there has no evidence received to show any connection between the land involved and Executive Order No. 7908.

(This specification covers part of Appeal Point 4. R. 54, 70).

SUMMARY OF ARGUMENT

The first three specifications of error raise essentially a single question of law: is "acquired" land, in general, and this land, in particular, open to mineral entry under the mining laws of the United States? That is the basic issue on this appeal. Since the first three specifications present essentially a single question, they are argued together.

That argument may be summarized as follows:

A. Executive Order No. 7672 legally describes the land in question and expressly provides that it is open to mineral entry.

B. Executive Order No. 7672 was issued by the President under the authority of the Withdrawal Act and that act required the land withdrawn to remain open to mineral entry.

C. The Attorney General of the United States construes a statutory withdrawal order such as Executive Order No. 7672, as leaving the land open to mineral entry.

D. This case may be decided upon the basis of the construction of Executive Order No. 7672 without deciding the abstract question whether acquired land is always open to mineral entry.

E. Executive Order No. 7672 is the controlling executive order insofar as the land in question is concerned.

F. Congress intended the term "lands belonging to the United States" in the mining laws of the United State to cover "acquired" land.

1. The legislative history of the mining laws and a comparative analysis of other statutes demonstrate that.

2. Congress was aware of the problem of acquired lands when it enacted the mining laws.

3. The case law supports the application of 30 U.S.C., Sec. 22 to acquired lands.

G. Congress has not passed any special legislation withdrawing the land involved here from mineral entry.

H. The court below has read distinctions into 30 U.S.C., Sec. 22 which were not placed there by Congress and in so doing has defeated the liberal purpose of the mining laws.

The argument on Specification of Error IV is briefly that any alleged determination that the land in question was not mineral made prior to acquisition of the land by the United States in 1937 is immaterial here. Specification of Error V specifies as error a finding of the court below upon the ground that there is a total absence of evidence to support it.

ARGUMENT: SPECIFICATIONS OF ERROR I, II AND III

POINT A: Executive Order No. 7672 legally describes the land in question and expressly provides that it is open to mineral entry.

This case is here primarily because the government officials concerned and the court below have disregarded the plain meaning of Executive Order No. 7672 and have read into it subtleties which have no basis in either law or the words of the order.

On July 12, 1937, the land in question was conveyed to the United States. R. 4-5. On July 19, 1937, the President signed Executive Order No. 7672 which reserved and set apart this land, along with many other parcels, for use and development by the Department of Agriculture in connection with the Central Oregon Land Project, LA-OR2. This order has never been revoked and the land in question here is still in the Central Oregon Land Project.

The text of the order is important and it is set out here in full, omitting only legal descriptions of land in other townships:

> "Executive Order
> "Withdrawal of Public Lands for the Use of the Department of Agriculture
> "Oregon
>
> "By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, it is ordered as follows:
>
> "Section 1. Executive Order No. 6910 of November 26, 1934, as amended, temporarily with-

drawing certain lands for classification and other purposes, is hereby revoked so far as it affects any public lands within the following-described area in Oregon:

"Willamette Meridian

" * * * (other townships omitted)

"T. 11 S. R. 12 E.

sec. 11, SE ¼ SE ¼;
sec. 12, SW ¼ NE¼, S ½ SW ¼, and SE ¼;
sec. 13, all; (Emphasis supplied)
sec. 14, E ½;
sec. 22, lots 1, 2, 3, and 4, NE ¼ SE ¼, and S ½ SE ¼;
secs. 23, 24, 25, and 26;
sec. 27, lots 1, 2, 3, 4, and 5, W ½ NE ¼, NE ¼ NW ¼, S ½ NW ¼, SW ¼, and W ½ SE ¼;
sec. 28, lots 1, 2, 3, and 4, S ½ SW ¼, and SE ¼;
sec. 29, lots 1, 2, 3, and 4;
sec. 30, lots 1, 2, 3, 4, 5, and 12, SE ¼ SW ¼, and SW ¼ SE ¼;
secs. 31, 32, 33, and 34;
sec. 35, N ½, SW ¼ and NW ¼ SE ¼;
sec. 36, N½ N½ and SE ¼ NE ¼;

" * * * (other townships omitted)

"Section 2. Subject to the conditions expressed in the above-mentioned acts and to all valid existing rights, all vacant, unappropriated, and unreserved public lands within the above-described area are hereby temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.

"Section 3. This order shall be applicable to all land within the area described in Section 1 hereof upon the cancellation, termination, or release of prior entries, selections, rights, appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly other wise provided in the order of revocation.

"Section 4. The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress.

"Franklin D. Roosevelt

"The White House
July 19, 1937"

"[No. 7672]"

"[F. R. Doc. 37-2273; Filed, July 20, 1937; 2:50 p. m.]"

During the depression years the United States bought much submarginal land. It was an agreed fact as to the land involved here:

> "The funds by which this purchase was made were a portion of the moneys appropriated by the Emergency Relief Appropriations Act of 1935. (49 Stat. 115)" Tr. 5.

Millions of dollars were so spent. 49 Stat. 115.

By 1937 the United States had acquired a great deal of land and the President then issued Executive Order No. 7672 dealing with the lands in Oregon, one of a series for the western states. Section 1 thereof revoked Executive Order No. 6910 "so far as it affects any *public lands* within the following described area in Oregon: "Willamette Meridian * * * T. 11 S., R. 12 E., * * * sec 13, *all;* * * * " (emphasis supplied). The land in question was in section 13, and it was admitted in writing by the Manager of the United States Land Of-

fice in Portland, Oregon, that all land in this section had been patented by 1937. R. 32, 45.

It seems clear that when Executive Order No. 7672, refers to *"public lands* within the following-described area in Oregon" the President meant to include in that phrase lands acquired by the United States under this submarginal land program. (Emphasis supplied). The reason being simply that "all" of section 13 is expressly described therein and there was nothing but acquired land in that section when the Executive Order was issued.

After having listed the land involved hereby its legal description in section 1 of Order No. 7672, the President then provided in section 2 that:

> "All vacant, unappropriated, and unreserved *public land within the above-described area* are temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: * * *." (Emphasis supplied).

The adjectives "vacant, unappropriated and unreserved" do not change the meaning of section 2 so far as it applies to the land here in question.

The land in question was, after its purchase, "vacant, unappropriated, and unreserved public land"; the United States had had title only seven days when the Executive Order was issued. R. 4. The adjectives "vacant, unappropriated and unreserved" have a definite technical meaning: land which has not been appropriated or

reserved by a private citizen. See 43 Words & Phrases, Perm. Ed., "vacant public land", p. 635; unappropriated public lands", p. 29, Supp. p. 12; "unreserved", p. 383.

This phrase is to be read together with section 3 of Executive Order No. 7672:

> "This order shall be applicable to *all lands within the area described in Section 1 hereof upon the* cancellation, termination, or release of prior entires, selections, rights appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation." (Emphasis supplied).

When section 2 is read with section 3, it is clear that by section 2 the President was blanketing into the land project immediately all land upon which a private citizen had not begun the process of appropriation or reservation. By section 3 he provided that, if this process of appropriation was not completed, then at that time of cancellation the land concerned should also come into the project.

The completion of the process of appropriation and reservation by a private citizen of public land may take some time to perfect and it may fail altogether after the initial steps are taken. Consequently, section 3 of the order quite properly provides that if any appropriation of land fails, that land is also to be governed by the order.

This also explains the difference in phraseology between section 1 and section 2. Section 1 covers "any public lands", i.e., all publically owned land in those listed sections, irrespective of whether or not appro-

priation or reservation has been started thereon by a private person. Section 2 adds the adjectives "vacant, unappropriated, and unreserved" to "public lands within the above-described area" to make it absolutely clear that land upon which appropriation by a private citizen has started is not to be blanketed into the project. In short, government ownership is not to override the fact that there may have been a partial appropriation which may result in the government granting a homestead or a mineral entry.

Finally we come to the core of the order from the viewpoint of this case. Section 2, setting up the withdrawal from entry, is qualified by an express proviso which reads as follows:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws."

The appellant made a mineral entry in reliance upon that language and the mining laws of the United States. Confining our attention to the executive order, it is clear that the President regarded the land which had just been acquired by the United States as "public lands".

Nothing in the order supports assumption of the court below that the term "public lands" in the order is restricted to lands which had never been patented as distinct from submarginal land which had been reacquired by the United States. R. 18, 22. In fact the evidence to the contrary is decisive: the President lists by legal description of "all" of section 13 in the order at a time when section 13 contained no unpatented land.

POINT B: Executive Order No. 7672 was issued by the President under the authority of the Withdrawal Act and that act required the land withdrawn to remain open to mineral entry.

The President did not inadvertently insert in Executive Order No. 7672 the carefully worded proviso expressly continuing the right of mineral entry upon the withdrawn lands; he was required to do so by the express command of Congress.

The preamble to the order recites:

> "By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat 497, it is ordered as follows: * * * "

The statutes referred to in the Executive Order are popularly referred to as the Pickett or Withdrawal Act and are now codified as 43 U.S.C., secs. 141 and 142:

> "Sec. 141. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, ch. 421, § 1, 36 Stat. 847.)
>
> "Sec. 142. *All* lands withdrawn under the provisions of this and the preceding section shall at *all* times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals: * * *" (Emphasis supplied).

It is difficult to conceive how Congress could have used more forceful or precise language to state that: if

the President withdraws land under these sections it remains open to mineral entry. The cinders involved here are metalliferous minerals. R. 5. The phrase "metalliferous minerals" was inserted in the law in 1912 in place of the phrase "minerals other than coal, oil, gas and phosphates". 43 U.S.C.A., sec. 142 historical note.

Not only did the President insert in his order the proviso keeping the land open to mineral development, as required by 43 U.S.C., sec. 142, but he was alse careful to state in section 2 that the withdrawal was "subject to the conditions expressed in the above-mentioned acts". The above-mentioned acts are, of course, none other than the act of June 25, 1910, ch 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, which are stated in the preamble to the order and are now codified as 43 U.S.C., sections 141 and 142.

Giving Executive Order No. 7672 its natural meaning requires a conclusion that the land here involved was open to mineral entry. In *Mason v. United States,* 260 U.S. 545, 43 S. Ct. 200, 67 L. ed. 396, the Supreme Court had occasion to construe an executive order withdrawing certain public lands and the court held that the primary rules to be followed were "that effect should be given to every part of a statute, if legitimately possible, and that words of a statute or *other document* are to be taken according to their natural meaning." p. 554. (Emphasis supplied)

If Executive Order No. 7672 is given its natural meaning, this case presents no particular difficulty. The

government officials concerned and the court below have read into Executive Order No. 7672 distinctions which the President neither had in mind or stated. This is especially evident when it is remembered that this was a statutory withdrawal under 43 U.S.C., section 141 and 142, popularly known as the Withdrawal or Pickett Act.

PRESIDENT HAS INHERENT POWER TO WITHDRAW LAND FROM ENTRY BUT HERE HE ACTED UNDER HIS STATUTORY POWERS

The President has inherent power to withdraw public land in addition to the statutory powers conferred on him by the Withdrawal Act. *United States v. Midwest Oil Company,* 236 U.S. 459, 59 L. ed. 673, 35 Sup. Ct. 309; *Sioux Tribe v. United States,* 316 U.S. 317, 325, 86 L. ed. 1501, 63 Sup. Ct. 1095.

While the President has the inherent power of withdrawing public lands without statutory authority, the President here chose to act under his statutory powers and hence subject to his statutory disabilities. The statute clearly provides that rights of mineral entry are not affected by a statutory withdrawal thereunder. Executive Order No. 7672 was issued under this statutory power of the President. The conclusion seems irresistible that the right of mineral entry was to continue here.

POINT C: The Attorney General of the United States construes a statutory withdrawal order such as Execuive Order No. 7672, as leaving the land open to mineral entry.

In taking the position that the right of mineral entry does not continue under Executive Order No. 7672, the court rejected on opinion of the Attorney General of the United States as to the effect of such an order. 40 Op. A.G. 73. While an opinion of the Attorney General was not binding upon the court below, nevertheless in a matter of this nature it should have considerable weight. It is the opinion of the chief legal officer of the United States as to what the chief executive officer of the United States was trying to accomplish by choosing the form of withdrawal order he did.

The Secretary of the Interior had requested an opinion on a proposed executive order entitled "Withdrawal of Public Lands for Use in Connection with the Squaw Butte Experimental Station-Oregon". In that case the Secretary wanted to know if the proposed order removed the lands involved from mineral entry. As Attorney General Jackson, later Mr. Justice Jackson, put it:

> "The purpose of the proposed order is so to withdraw and reserve the lands that they will not be subject to such mining law." p. 74.

The proposed order did not rely upon the Withdrawal Act, but upon the general authority of the President:

> "In submitting the order you rely upon no express statutory authority for its execution but upon the general authority of the President to withdraw land for public use freed of the operation of the mining

> laws, notwithstanding the provisions of the act of June 25, 1910, c. 421, 36 Stat. 847 (U.S.C., title 43, secs. 141-3), as amended by the act of August 24, 1912, c. 369, 37 Stat. 497." p. 74.

The Attorney General analyzed at great length the legislative history of the Withdrawal Act. The Attorney General also analyzed the administrative practice of the government on land withdrawals. He concluded that there is a two-fold plan as to withdrawals: temporary withdrawals under the Withdrawal Act which are subject to mineral entries; and withdrawals under the general authority of the President are not.

The opinion sums this up in the following manner:

> "When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mineral laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply." 40 Op. A.G. 73, 81.

Consequently, the Attorney General advised the Secretary of the Interior that since the proposed order was not based upon the statutory authority given by the Withdrawal Act, the land withdrawn would not be subject to mineral entry.

Here we have the converse case. Executive Order No. 7672 is explicitly stated to be a temporary withdrawal "by virtue of and pursuant to the authority vested in me" by the Withdrawal Act. The President even added an explicit proviso in the order that mineral

entry should continue. As the Attorney General states:

> "The status of lands which would be temporarily withdrawn after the act of 1910 for purposes coming within its provisions was fixed by the terms of that act, which made the mining laws applicable." 40 Op. A.G. 73, 80-81.

Finally, the Attorney General's analysis of the general administrative practice of the government should have been persuasive. He points out that the President claims to act under his general powers in making "permanent withdrawals for authorized public uses such as military reservations, light-houses, post offices, or the like" while the statutory withdrawals relate to conservation matters. 40 Op. A.G. 73, 80. This two-fold system leaves to the President the question whether or not land withdrawn should be open to mineral entry or not. If it is to be open, he acts under his statutory powers as he did here.

Indeed, this case would not have arisen if the officials concerned had been willing to give proper weight to the Attorney General's opinion as to the effect of the form of Executive Order No. 7672.

POINT D: This case may be decided upon the basis of the construction of Executive Order No. 7672 without deciding the abstract question whether acquired land is always open to mineral entry.

There is a vast amount of government land in this country other than the land which has never been patented. The President, as the chief executive officer of the government, can act swiftly and directly to withdraw land for special purposes by issuing appropriate executive orders. The problem of mineral entry ought not to be decided on the irrelevant basis of whether or not the public land in question has always been owned by the United States or has been acquired after a period in private ownership.

The problem of mineral entry on land owned by the United States ought to be solved by construing those executive orders, rather than, as the court below did, laying down an abstract and theoretical principle that land purchased by the government is not public land. In short, there is no need to decide such a sweeping question with an infinite variety of ramifications which can arise out of the various kinds of government land from customs houses to guided missile ranges. Probably one result of so deciding will be to develop a complex case law that says while "acquired land" is not "public land" for mineral entry, the various statutes and case law principles covering such matters as trespass and local tax paying must be applied to "acquired land" as if it were "public land".

The proper judicial function here is to construe the words which have been used by the President as the

chief executive, and then each case may be decided with the over-all policy of the government, as embodied in the executive orders relating to hundreds of types of land uses by the government. If the President wishes the rights of mineral entry to continue in land, he acts under his statutory powers, as he did here. If he simply wants them for some traditional use such as a light-house site, he can withdraw the land under his traditional inherent powers without any proviso that the land be subject to mineral entry. It is submitted that this is the easy way to handle the great variety of land problems which arise.

Here the President acted wisely in keeping open the arid, largely worthless land in the Central Oregon Land Project to mineral entry. Conservation is wise use to develop the full potential of the land, not arbitrary restrictions. The President has decided that this land should be subject to mineral entry and the court below failed to carry out his considered judgment as stated in Executive Order No. 7672.

POINT E: Executive Order No. 7672 is the controlling executive order insofar as the land in question is concerned.

The land in question here was purchased July 12, 1937. R. 4. It was an agreed fact that:

> "The funds by which this purchase was made were a portion of the moneys appropriated by the Emergency Relief Appropriations Act of 1935. (49 Stat. 115)." R. 5.

On July 19, 1937, the President issued Executive Order No. 7672. It was an agreed fact that:

> "The President had authority under the Emergency Relief Appropriations Act of 1935 and under the act of August 24, 1935 (49 Stat. 115) to make disposition of all of said lands, including said Section 13 as was made by said Executive Order." R. 9.

On July 22, 1937, Congress passed the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 7 U.S.C., sec 1001 et seq. The court below found that the land in question was "transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Tenant Act" by Executive Order No. 7908. R. 21. This finding is elsewhere in this brief specified as error.

But assuming for the moment that finding is correct, the most that can be said for Executive Order No. 7908 is that it transfers the administration of land to the Secretary of Agriculture and it does not affect appellant's mineral claim. The administering agency is an irrelevant factor: at the time of trial the Department of Agriculture did not have jurisdiction over these mineral deposits. It was stipulated in the Pre-Trial Order:

> "It is stipulated that under reorganization plan No. 3 of 1946 (5 U.S.C.A. cumulative 106) jurisdiction over mineral deposits on land held by the Department of Agriculture, acquired in connection with the efforts of the Government to retire submarginal lands, has been transferred to the Department of the Interior."

An inspection of Executive Order No. 7908 shows that it did not revoke Executive Order No. 7672. Repeals by implication are not favored and it is apparently the universal practice with executive orders that any earlier orders revoked are specifically listed in the revoking order. For example, section 1 of Executive Order No. 7672 revoked Executive Order No. 6910 in part.

The reason for this rule seems to be administrative convenience; otherwise it would be difficult to know which orders of the vast mass of executive orders are actually in force. The clinching argument against any implied repeal here is that there is no other order placing the land listed in Executive Order No. 7672 in the Central Oregon Land Project. Yet it has been the appellee's consistent position that the land involved here is in that project.

Executive Order No. 7672 expressly provides:

> "The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress."

Here no executive order or act of Congress has modified Executive Order No. 7672.

When Congress deals with entry rights on government land it does so in a forthright and unmistakable

manner. For example, the Act of March 3, 1927, c. 318, 44 Stat. 1359 provides:

> "All public lands of the United States within the boundaries hereinafter described are hereby withdrawn from settlement, location, sale and entry under the public land laws of the United States for recreational purpose, * * *. The lands herein referred to are located in the State of California."

Since Executive Order No. 7672 has never been revoked, any subsequent changes in the agency administering the land cannot affect the right of mineral entry in the lands described in Executive Order No. 7672. On those lands, the President has spoken and has stated as clearly as language can:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of the lands under the applicable laws."

This proviso has never been revoked and hence remains in full force and effect.

POINT F: Congress intended the term "lands belonging to the United States" in the mining laws of the United States to cover "acquired" land.

30 U.S.C., sec. 22, is entitled "Lands open to purchase by citizens", and is particularly in point:

> "Except as otherwise provided all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under the regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R.S. 2319; Feb. 25, 1920, ch. 85, § 1, 41 Stat. 437.)"

The controlling question is: what did Congress mean when it used the phrase "lands belonging to the United States"? Or more particularly: did Congress intend by this phrase to cover vacant land which is "chiefly valuable as mineral land" where this land had once been conveyed by the United States and afterwards reacquired?

The court concluded as a matter of law:

> "Such 20-acre tract is not in the *public domain* but is *acquired land* not subject to mineral entry." R. 22 (emphasis supplied).

It is apparent that the court below used the vague term "public domain" in a special restricted sense of public land which had never been patented.

30 U.S.C., sec. 22, does not say unpatented public lands; it says "lands belonging to the United States". There is no basis for the distinction the court below drew between "acquired" lands and unpatented public lands so far as the mining laws of the United States are concerned. Congress has made no such distinction.

In fact, Congress discarded the phrase "public domain" lands in favor of the more specific phrase "lands belonging to the United States". Except for the introductory phrase, "except as otherwise provided", the text of 30 U.S.C. sec. 22 comes directly from the basic mining law: the Act of May 10, 1872, c. 152, sec. 1, 17 Stat. 91. The Act of May 10, 1872, was preceded by the Act of July 26, 1866, c. 262, sec. 1, 14 Stat. 251.

Section 1 of the Act of 1866 is closely similar in wording to section 1 of the Act of 1872 and hence to 30 U.S.C. sec. 22. There is one significant change, however: the Act of 1866 used the phrase:

> "the mineral lands of the public domain * * *."

In 1872 this phrase was discarded and replaced with:

> "all valuable mineral deposits in lands belonging to the United States * * *."

In short, Congress, when it came to revise the unsatisfactory Act of 1866, dropped the reference to "lands of the public domain" and replaced it with the more technically precise phrase "lands belonging to the United States". The legislative history of 30 U.S.C. sec. 22 thus makes it clear that the phrase "lands belonging to the United States" does not refer simply to

unpatented land, as the court below assumed. Conclusion of Law IV, R. 22.

Congress, itself, has given 30 U.S.C. sec. 22 the construction which includes acquired land under it. In 1916 Congress desired to obtain a section of land owned by the State of Dakota. Congress felt it necessary to provide that the section thereby obtained from the State of North Dakota:

> "shall not be subject to settlement, location, entry, or selection under the public-land laws, but shall be reserved for the use of the Department of Agriculture in carrying on experiments in dry-land agriculture at the Northern Great Plains Field Station, Mandan, North Dakota." 39 Stat. 344, 43 U.S.C. sec. 153.

ACQUIRED LANDS ARE AN OLD PROBLEM

Actually, the problem of acquired lands is an old one. Legislation of Congress dealing with land titles of the land acquired from Mexico by the Mexican War shows that Congress was aware of the existence of acquired lands prior to 1872. The history of that situation in California is summarized in *Botiller v. Dominguez,* 130 U.S. 238, 32 L. Ed. 925, 9 Sup. Ct. 525. Reference is also made in the opinion of numerous other acquisitions of land and Congressional action in connection therewith (p. 251).

All existing land claims which arose under the Mexican occupation in California had to be submitted to a board of commissioners within certain time limits; otherwise the land should "be deemed, held and considered as part of the public domain of the United

States." Act of March 3, 1851, 9 Stat. 631, 633. Thus, if the claim was not presented, no matter how good the Mexican title of the private owner, the land would become part of the public domain, i.e., publically owned. Land which was not presented to the board thus was "acquired" by the United States, not by war, but by statutory expropriation, which would not be greatly different from the way the United States acquires property now from its citizens, except that compensation is now paid.

THE CASE LAW SUPPORTS THE APPLICATION OF 30 U.S.C. SEC 22 TO ACQUIRED LANDS

Not only is the problem of acquired land an old one, but the case law supports the proposition that the phrase "lands belonging to the United States" includes acquired lands. During the Civil War, Congress passed a virtually confiscatory tax law as to the southern states. The Act of June 7, 1862 is entitled "An Act for the Collection of direct Taxes within Insurrectionary Districts within the United States, and for other purposes." 12 Stat. 422. Essentially it provided that if direct taxes were not peaceably collected in any state "by reason of insurrection or rebellion" the direct taxes due were to be apportioned against the owners of real property in rebellious districts. If the apportioned tax was not paid, title to the land forfeited to the United States. Act of June 7, 1862, 12 Stat. 422, 423.

Verdier v. Railroad Company, 15 South Carolina 476, arose as a result of the United States having acquired land in 1863 under the provisions of the Act of

June 7, 1862 (p. 478). The land had previously been privately owned. *Verdier,* p. 478.

In 1866 in section 9 of the basic mining act heretofore referred to, Act of July 26, 1866, 14 Stat. 251, Congress provided that:

> "the right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." 14 Stat. 253, U.S. Rev. Stat., p. 456, sec. 2477.

In the *Verdier* case, the railroad entered the land in 1870 and claimed under section 9 of the Act of 1866. The court held the railroad's title was good as against another who also claimed through the United States by a deed given in 1876. The court held that the land which the United States had acquired by the operation of the Civil War direct tax laws was "public land" granted under the Act of 1866, saying:

> "It is true that these lands, having been previously granted and owned as private property, were not original public lands like those unsettled in the new states and territories, but we suppose that after the United States acquired the title they were held for the benefit of all the citizens of the government and were 'public lands' in the sense of the Act of Congress." (p. 480).

There must have been hundreds of such tracts of acquired land since it is extremely doubtful if the federal direct taxes were being collected in the states of the Confederacy during the Civil War. "Acquired" land is no new problem and Congress was aware of its existence when it passed the Act of May 10, 1872, 17 Stat. 91.

Murphy v. State, 65 Ariz. 338, 181 P. 2d 336, provides an analogy to the case at bar. The court held that the terms "state lands" or "public lands" within the meaning of the Arizona Constitution included land acquired by the State by the process of mortgage foreclosure.

The court below refused to follow *Verdier v. Railroad Company,* 15 South Carolina 476. Instead it relied upon *United States v. Holliday,* 24 F. Supp. 112. But that case does not involve any statutory right to acquire title from the United States; it only involved "the implied license to graze over unenclosed public lands that has existed for so many years." p. 114. It simply held that the United States had a right to enjoin a continuing trespass by a sheep rancher upon some grazing land which had been newly reseeded by the United States with Crested Wheat grass to restore the range. Here the question is the construction of the mining laws of the United States and the effect of Executive Order No. 7672. Neither question was present in the Holliday case.

In the court below, the appellee repeatedly cited *Oklahoma v. Texas,* 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406. Unlike the Holliday case, the Oklahoma case does deal with the mining laws of the United States, but it is not in point here since it does not deal with "acquired" lands but with lands which the United States had never granted to anyone.

The appellee, however, has repeatedly quoted from that case the following dicta with reference to 30 U.S.C. sec. 22:

> "This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of the 'The Public Lands.' To be rightly understood, it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington, or to the lands in the National Cemetery at Arlington, no matter what the mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western states. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws."

The basic question presented to the court was the ownership to the bed of Red River, all of which was in Oklahoma. The court held that the United States had retained title to the south half of the bed of the river and had never granted it to anyone (pp. 575-6).

The court then proceeded to the question of whether placer mining locations were validly made in the south half of the river bed (pp. 599-602). The court held they were not. The court reached that result by considering a whole series of Congressional acts dealing with Oklahoma, which made it clear that Oklahoma, Indian Territory, was a special case to which Congress did not desire 30 U.S.C. sec. 22 to apply.

It is only necessary to mention two of these acts: (1) in 1890 Congress provided that "lands in that territory should be disposed of under the homestead and townsite laws 'only' "; and (2) in 1891 Congress further provided " 'all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.' " (p. 600).

In the case at bar there is no such pattern of special legislation dealing with disposal of the land in question, making it clear that the general mining laws are not to apply here. Here Congress has not passed any special legislation excluding the land from the operation of the mining laws of the United States.

The land was acquired with "moneys appropriated by the Emergency Relief Appropriations Act of 1935 (49 Stat. 115)". R. 5. This act is simply an appropriation act and set up no policy as to mineral entry on the land acquired. This was left to the President who acted by issuing Executive Order No. 7672.

Here the general mining law should apply since Congress has not provided to the contrary. The Supreme Court has stated the rule as follows:

> "Public lands belonging to the United States for whose sale or other disposition Congress has made provision by its general laws are to be legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either express or implied." *Lockhart v. Johnson,* 181 U.S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979.

POINT G: Congress has not passed any special legislation withdrawing the land involved here from mineral entry.

Here there is no special legislation applying to the land involved here. It is true that Congress in 1947 passed an Act entitled "Lease of Mineral Deposits Within Acquired Lands", 61 Stat. 914, 30 U.S.C. sec. 351 et seq. However, an examination of section 352 shows that its operation is restricted to the following minerals: "All deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulphur, * * *."

For a long time Congress has treated this specialized group of minerals separately. The extraction problems and hence the legal problems of this special group of minerals differ from those of ordinary metalliferous minerals. Consequently, in 1920 Congress passed what is popularly known as the Federal Leasing Act: Act of February 25, 1920, 41 Stat. 437. This law enacted "that deposits of coal, phosphate, sodium, oil, oil shale, or gas", should be "subject to disposition only in the form and manner provided by this Act." 41 Stat. 437, 451.

In recognition of this fundamental change as to these specialized minerals, the compilers of the United States Code inserted the introductory words "except as otherwise provided" in 30 U.S.C. sec. 22 so that now reads:

> "Except as otherwise provided, all valuable mineral deposits" etc.

instead of

> "All valuable mineral deposits", etc.

Explanatory note, 30 F.C.A. sec. 22.

The 1947 act recognized existing leases on acquired lands as to these specialized minerals. 30 U.S.C. sec. 358 provides:

> "Nothing in this chapter shall affect any rights acquired by any lessee of lands subject to this Act under the law as it existed prior to the August 7, 1947, and such rights shall be governed by the law in effect at the time of their acquisition; but any person qualified to hold a lease who, on August 7, 1947, had pending an application for an oil and gas lease for any lands subject to this chapter which on the date the application was filed was not situated within the known geologic structure of a producing oil or gas field, shall have a preference right over others to a lease of such lands without competitive bidding. Any person holding a lease on lands subject hereto, which lease was issued prior to August 7, 1947, shall be entitled to exchange such lease for a new lease issued under the provisions of this chapter, at any time prior to the expiration of such existing lease. (Aug. 7, 1947, c. 513, § 9, 61 Stat. 915.)"

The main purpose of the 1947 act appears to have been to centralize administration of leasing of acquired lands in the Department of the Interior. This appears from the explanation of the bill given by the House Committee on Public Lands:

> "The purpose of this bill is to promote and encourage the development of the ore, gas, and other minerals on the acquired lands of the United States *on a uniform basis under the jurisdiction of the Department of the Interior.*"
>
> * * * *
>
> "In the interest of economy, the bill eliminates several agencies *now engaged in leasing acquired lands for oil and gas,* and centralizes this function in the Department of the Interior." U.S. Code Congressional Service, 80th Congress, 1st Session 1947, p. 1662. (Emphasis supplied).

POINT H: The court below has read distinctions into 30 U.S.C., sec. 22, which were not placed there by Congress and in so doing has defeated the liberal purpose of the mining laws.

It has previously been argued in detail that the mining laws of the United States are applicable here. Congress' use of the term "lands belonging to the United States" is a precise technical phrase which does not include any distinction between lands never patented and lands acquired after patenting.

Appellant contends that the phrase covers "acquired" land. The government officials concerned and the court below have sought to read into the mining laws of the United States the words "lands never patented" where Congress uses the words "lands belonging to the United States". But in 1872, when the mining laws were enacted, Congress rejected the loose phrase "public domain" and instead used the precise phrase "lands belonging to the United States".

The same frame of mind on the part of the officials concerned and the court below is seen in their construction of Executive Order No. 7672. "All" of section 13 was expressly listed in the order and there was no unpatented land in this section when the order was issued, yet they would read the language "all" of section 13, T. 11 S., R. 12 E. Willamette Meridian, out of the order.

The construction suggested results in absurdity. If it is correct, one section of land on a desolate sage brush butte would be open to mineral entry while the next abutting section of hard pan and sage brush would

not be because it happened to have once been patented for a homestead that had to be abandoned.

The President did not intend any such result. For example, all of section 24 in the township involved here is listed in Executive Order No. 7672. Yet the manager of the United States Land Office stated that only two forty-acre tracts therein had not been patented by 1937. R. 32, 45.

Furthermore, in issuing Executive Order No. 7672 the President acted under the powers granted by the Withdrawal Act, 43 U.S.C. secs. 141 and 142, and under that act it was mandatory that the right of mineral entry continue on the lands withdrawn.

Fundamentally, the reason for this case having arisen is the unwillingness of the officials concerned to abide by the Attorney General's opinion as to the effect of a *statutory* withdrawal order. 40 Op. A.G. 73. In that opinion he expressly states that with such a withdrawal order the right of mineral entry would continue. 40 Op. A.G. 73, 80-81. In short, if the President chooses to act under his statutory rather than his inherent powers, he acts subject to his statutory disabilities.

The preamble of the Act of May 10, 1872, 17 Stat. 91, which enacted the mining laws of the United States recites that its purpose was "to promote the Development of the Mining Resources of the United States". The mining laws "have been construed very liberally in favor of the miners". Davis, *Fifty Years of Mining Law,* 50 Har. L. Rev. 897, 900. The general policy of the

mining laws of the United States "has been to promote widespread development of mineral deposits and to afford mining opportunities to as many people as possible." *U. S. v. Ickes,* 98 F. 2d 271, 279, cert. den. 305 U.S. 619, 59 Sup. Ct. 80, 83 L. Ed. 395.

The court below has defeated the liberal intent of the mining laws of the United States by reading into the phrase "lands belonging to the United States" found in 30 U.S.C. sec. 22, distinctions which Congress did not place there. To a large extent the development of the West has been based upon a liberal construction of these mining laws.

If the government officials concerned feel that they are too broadly drawn and too generous with government-owned land, their remedy is in Congress, not in the courts. There is no ambiguity in either 30 U.S.C. sec 22, or in Executive Order No. 7672, and both require a finding that the court below was in error in holding appellant's mineral claim null and void because it was located on "acquired" land.

ARGUMENT ON SPECIFICATION OF ERROR IV

POINT: Any alleged determination of mineral character of the land prior to acquisition thereof by the United States in 1937 is immaterial.

Any determination as to mineral character made by the Department of the Interior prior to the time the United States acquired title in 1937 is ineffective. The United States bought this land for the purpose among others "of retiring submarginal land from agricultural use". R. 7. In short, the United States considered any alleged prior determination that the land was agricultural to be such a grave mistake that considerable money was spent to stop such use. R. 4-5.

Though it makes no difference now that the land was reacquired it may be noted in passing that:

> "The said Marie R. Stoller, to whom the government issued its homestead patent as aforesaid in 1915, had not at any time prior to the issuance of said patent cultivated any portion of the lands patented to her within the boundaries of said 20-acre tract known as the Luck Strike claim herein referred to." Agreed Fact VIII, R. 7.

The United States purchased the land in question so that a new start might be made in its land use. Consequently, the United States was willing to agree that it was a fact that:

> "The said mound is situated in part within the boundaries of the
>
> > West Half (W ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of Section 13,

> containing 20 acres more or less and as to the said 20 acres just described, a physical examination thereof indicates that said 20-acre tract is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface. Said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." Agreed Fact VI, R. 6.

It would be contrary to sound public policy to hold that any alleged determination of mineral character made in 1915 should be a binding determination as to land acquired by the United States in 1937.

ARGUMENT ON SPECIFICATION OF ERROR V

POINT: There was a total absence of evidence that Executive Order No. 7908 applies to the particular land involved here.

The appellee offered no evidence showing that Executive Order No. 7908 applies to the particular land involved here, and there is in fact a total absence of any evidence supporting this finding. Executive Order No. 7908 is an administrative order stated in general terms; and unlike Executive Order No. 7672, it does not list any land descriptions.

CONCLUSION

Both 30 U.S.C. sec. 22 and Executive Order No. 7672 authorize mineral entry on the land in question. Consequently, it follows that the court below was in error in adjudging appellant's mining claim null and void.

Respectfully submitted,

NORMAN N. GRIFFITH,
Attorney for Appellant.

No. 14661

In the United States Court of Appeals for the Ninth Circuit

SAM D. RAWSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

PERRY W. MORTON,
Assistant Attorney General.
C. E. LUCKEY,
United States Attorney, Portland, Oregon.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice, Washington, D. C.

FILED
JUN 27 1955
PAUL P. O'BRIEN, CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument:	
Appellant has no right in the minerals underlying the land in question	4
A. The mining laws apply only to lands which are "public domain" or "public lands" of the United States	4
B. The land here in question was acquired by the United States for a specific purpose, has never been added to the public domain, is not held for disposition under the general land laws of the United States, and hence is not subject to entry under the mining laws	7, 8
C. Pursuant to authority given by Congress the mineral deposits on this land were validly disposed of prior to appellant's pretended entry	9
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Bardon v. *Northern Pacific Railroad*, 145 U. S. 535	4
Barker v. *Harvey*, 181 U. S. 481	4
Jones v. *United States*, 195 F. 2d 707	8
Mann v. *Tacoma Land Company*, 153 U. S. 273	4
Minnesota v. *Hitchcock*, 185 U. S. 373	4
Newhall v. *Sanger*, 92 U. S. 761	4
Oklahoma v. *Texas*, 258 U. S. 574	5, 6, 9
Union Pacific R. R. Co. v. *Harris*, 215 U. S. 386	4
United States v. *Holliday*, 24 F. Supp. 112	8
United States v. *Schaub*, 103 F. Supp. 873, affirmed *per curiam*, 207 F. 2d 325	12
Statutes:	
Act of July 26, 1866, 14 Stat. 251	4
Act of May 10, 1872, 17 Stat. 91	4, 6, 7
Bankhead-Jones Farm Tenant Act, July 27, 1937, 50 Stat. 522, 7 U. S. C. sec. 1011	10
Emergency Relief Appropriations Act of 935, 49 Stat. 115	8
Reorganization Plan No. 3 of 1946, sec. 402, 60 Stat. 1097	11
Title 30 U. S. C. sec. 22	4
Withdrawal Act of 1910, 36 Stat. 847	9

Miscellaneous: Page
Cong. Globe, 42d Cong. 2d sess ... 6, 7
Executive Orders:
No. 7027 ... 10
No. 7530 ... 10
No. 7672 ... 8
No. 7908 ... 10
H. R. 1016, 42d Congress ... 6
S 1103, 41st Cong., 3d sess ... 6
40 Op. A. G. 73 ... 9

In the United States Court of Appeals for the Ninth Circuit

No. 14661

Sam D. Rawson, appellant

v.

United States of America, appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's unreported opinion appears at pages 42–45 of the record.

JURISDICTION

The jurisdiction of the district court rested on 28 U. S. C. sec. 1345 (R. 3). A final judgment and order of injunction was entered on December 23, 1954 (R. 47–51). Notice of appeal was filed on January 20, 1955 (R. 51). The jurisdiction of this Court rests on 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether land purchased by the United States for a specific purpose is open to location under the general mining laws.

STATEMENT

This is an action by the United States to enjoin appellant from occupying a tract of Government land and from removing volcanic cinders therefrom. The land consists of 20 acres located in Section 13, Township 11 South, Range 12 East, of the Willamette Meridian in Jefferson County, Oregon. The facts are not in dispute (R. 3–9) and may be summarized as follows:

In January 1915, the Department of the Interior issued a homestead patent to a tract of land containing 160 acres, which included the 20 acres here involved, to Marie R. Stoller. On July 12, 1937, the United States purchased a tract of land containing 607.81 acres, which included the 160 acres, from the grantee of Stoller. The land was acquired for the purpose of retiring submarginal lands from agricultural use, preventing soil erosion, to protect watersheds, to conserve wildlife, and other allied purposes. The purchase was made with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. In June, 1938, these lands were, by Executive Order No. 7908 (App. 13–14), designated for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act (App. 14–16). (R. 20–21).

In 1940, the United States Department of Agriculture and the State Highway Commission of Oregon entered into a fifty year licensing agreement whereby the Highway Commission was authorized to remove stone, gravel and similar substances from the land

here involved for use in construction upon or in connection with the property (R. 7–8).

On February 17, 1951, appellant posted a notice of location of a placer mining claim on the 20 acres here involved, and filed the notice in the office of the County Clerk of Jefferson County, Oregon. Thereupon, appellant entered upon said land and removed quantities of volcanic cinders (R. 21).

On March 5, 1952, the United States brought this action to declare appellant's placer mining claim invalid, to permanently enjoin him from using or occupying the land and removing volcanic cinders therefrom, and for a judgment for the value of the cinders removed (R. 16). On September 28, 1954, the court filed an opinion in which it held that the land on which appellant had filed a placer mining claim was not subject to disposal under the general mining laws (R. 42–45). A final judgment and order of injunction was entered on December 23, 1954 (R. 47–51), reaffirming a judgment and order entered December 28, 1953 (R. 23–26).[1] Appellant's mining claim was adjudged to be null and void and of no force and effect, and he was permanently enjoined from entering, trespassing, occupying, possessing or removing cinders from the land. He was ordered to pay the sum of $120.00 damages for the removal of cinders prior to

[1] The appellant, on January 29, 1954, filed a motion to vacate the judgment of December 28, 1953, which was characterized as an "interlocutory judgment," primarily on grounds of newly discovered evidence. The court considered the motion on its merits without passing on the question whether it was interlocutory (R. 43).

the order of injunction. This appeal followed (R. 51).

ARGUMENT

Appellant has no right in the minerals underlying the land in question

A. *The mining laws apply only to lands which are "public domain" or "public lands" of the United States.*—Appellant's primary contention (Br. 28–40) is that he may make a mineral entry of the land in question under Title 30 U. S. C. sec. 22, which provides for mineral entries on "lands belonging to the United States." This language first appeared in the Act of May 10, 1872, 17 Stat. 91, opening to exploration and purchase "all valuable mineral deposits in lands belonging to the United States." Prior to that time, mineral lands were subject to disposition under the Act of July 26, 1866, 14 Stat. 251, which related to "the mineral lands of the *public domain.*" [Italics supplied.] "Public domain" or "public lands" were authoritatively defined in *Newhall* v. *Sanger,* 92 U. S. 761, 763 (1875), where the Supreme Court declared that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." That has been quoted and reaffirmed in numerous cases. *Union Pacific R. R. Co.* v. *Harris,* 215 U. S. 386, 388 (1910); *Minnesota* v. *Hitchcock,* 185 U. S. 373, 391 (1902); *Barker* v. *Harvey,* 181 U. S. 481, 490 (1901); *Mann* v. *Tacoma Land Company,* 153 U. S. 273, 284 (1894); *Bardon* v. *Northern Pacific Railroad,* 145 U. S. 535, 538 (1892). "Public domain" has the same meaning. *Barker* v. *Harvey, supra.*

Hence, it is quite clear that under the 1866 Act mineral claims could be established only on lands forming part of the public domain or "public lands" of the United States, i. e., lands held by the United States for disposition under the general land laws. Appellant's argument (Br. 29) that by using the phrase "lands belonging to the United States" rather than the phrase "public domain" broadened the category of lands to which the 1872 Act applies, was answered by the Supreme Court in *Oklahoma* v. *Texas,* 258 U. S. 574, 599–600 (1922). The Court there said:

> This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western States. *Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply;* and it never applies where the United States directs that the disposal be only under other laws. [Emphasis added.]

Thus, it is established that there is no difference in meaning between the 1872 Act and its predecessor, the Act of 1866, and that entry under both of these statutes is confined to public domain, i. e., lands held by the United States for disposal under the general land laws.

The attempt by appellant (Br. 33–35) to limit the application of *Oklahoma* v. *Texas, supra,* to the State of Oklahoma must fail since the 1872 Act obviously has the same meaning as applied to Oklahoma as to any other State. It should be noted that the legislative history of the 1872 Act completely supports the view that in regard to the present controversy the two acts had the same meaning. A bill to modify the 1866 act in certain procedural aspects, exactly repeating the language "public domain" of that Act, passed the Senate on February 7, 1871, but was not acted upon by the House. S. 1103, 41st Cong., 3d sess.; Cong. Globe, pp. 897, 1026.[2] A similar modification was undertaken in the second session of the 42d Congress by H. R. 1016, which passed both houses and was approved May 10, 1872. 17 Stat. 91. That act provided "That all valuable mineral deposits in *lands belonging to the United States,* both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase * * *." [Emphasis added.] Representative Sargent, who introduced the 1872 bill and was in charge of it in the House, said in explaining it, "The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest de-

[2] At page 1026 the bill is mistakenly called H. R. 1103.

gree the policy of the Government in the disposition of the mining lands." Cong. Globe, 42d Cong., 2d sess., p. 534. Referring to the Senate bill in the previous Congress, he said, "The only change from the Senate bill, I believe, is in the matter of advertising notice * * *." *Ibid.*

These statements by the sponsor of the 1872 act clearly show that it was not intended to have any broader application than the previous mineral law relating to the "public domain"; and there is nothing in the congressional debates on the measure to suggest that anyone took a different view of it.[3]

The mining laws thus relate only to the "public domain" and are inapplicable here, since the land in question was not "public domain."

B. *The land here in question was acquired by the United States for a specific purpose, has never been*

[3] That it was understood to be limited to public lands is indicated, for example, by the fact that a proposal for special disposition of the proceeds of mineral lands under the act was withdrawn when Senator Pomeroy suggested, "I think the Senator had better withdraw his amendment and let us consider it by itself on the bill which appropriates the proceeds of the *public lands*. The mineral lands will properly be considered under that bill * * *." Cong. Globe, 42nd Cong., 2d sess., p. 2462 (1872). [Emphasis added.]

There was no House report on the measure (see Cong. Globe, 42d Cong., 2d sess., pp. 395, 534 (1872)). The Senate report (see *ibid.*, p. 2058) seems not to have been printed, either as a congressional document or in the Appendix to the Congressional Globe. The act, as printed in Statutes at Large, carries the marginal synopsis, "Valuable mineral deposits in *public lands* and the lands to be open to citizens, etc." [Emphasis added.] 17 Stat. 91.

added to the public domain, is not held for disposition under the general land laws of the United States, and hence is not subject to entry under the mining laws.— This land was purchased by the United States on July 12, 1937, with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, which authorized the acquisition of lands for use in projects, *inter alia,* of "prevention of soil erosion" (49 Stat. p. 116). On July 20, 1937, it was placed under the control and management of the Secretary of Agriculture in connection with such a soil erosion project by Executive Order No. 7672 (Br. 11–13). Plainly, the land at this point was not subject to disposal under the general land laws. *United States* v. *Holliday,* 24 F. Supp. 112 (D. Mont. 1938); cf. *Jones* v. *United States,* 195 F. 2d 707, 709 (C. A. 9, 1952).

Appellant's reliance on Executive Order No. 7672 as opening the land to disposition under the mineral laws (Br. 11–27) is unavailing. A mere reading of that order shows that it was not intended to subject any lands to the mining laws which prior to the withdrawal were not subject to such laws. The proviso plainly means only that such of the withdrawn lands as could be entered under the mining laws prior to withdrawal remain subject to such entry. That refers in terms to lands which previously could be entered "under the applicable laws." For reasons stated above, this land prior to the withdrawal was not subject to the general land laws, and the executive order shows

no intention of bringing that about.[4] Certainly there is no warrant for construing this proviso, which is normal in withdrawal orders, so as to extend the mining laws to properties to which they would not otherwise apply. The mere fact that all of Sec. 13 at one time had been disposed of, so heavily relied upon by appellant (Br. 12–16), does not justify such an expansion of the proviso, nor does it indicate that none of the lands mentioned in the Executive Order were subject to disposal under the mining laws.

C. *Pursuant to authority given by Congress the mineral deposits on this land were validly disposed of prior to appellant's pretended entry.*—While for reasons stated above, this land after acquisition by the United States was not within the scope of the general land laws, the further history demonstrates beyond question

[4] There is nothing in the opinion of the Attorney General, 40 Op. A. G. 73, cited by appellant (Br. 20–22), which lends any support whatever to his pretended claim. That opinion refers only to unpatented land forming part of the public domain, and thus subject to the mineral laws before the withdrawal. The opinion holds merely that public domain land withdrawn temporarily under the Withdrawal Act of 1910, 36 Stat. 847, does not suspend the operation of the mineral laws. The opinion thus has no bearing with respect to lands purchased by the United States as distinct from lands always a part of the public domain. Moreover, even if public domain lands were here involved, the Attorney General's opinion makes clear that the President and, of course, the Congress can so dedicate lands to a permanent use as to exclude them from the operation of the general land laws. And, as shown, *infra*, pp. 11–12, this land has been so disposed of by valid administrative action pursuant to statutory authority. As the Supreme Court stated in *Oklahoma* v. *Texas*, 258 U. S. 574, 600 (1922): "* * * it [30 U. S. C. sec. 22] never applies where the United States directs that the disposal be only under other laws."

that rather than exposing this land for disposition under such general laws Congress has, in fact, authorized its disposition under special legislation. On June 9, 1938, the land was specifically transferred to the Secretary of Agriculture by Executive Order No. 7908 (App. 13–14), for administration under the Bankhead-Jones Farm Tenant Act approved July 27, 1937 (50 Stat. 522, 525, 7 U. S. C. sec. 1011).[5] Congress thereby gave the Secretary of Agriculture very broad powers as to the use or disposition of lands acquired to effectuate the program provided for under this Act (App. 14–16). He could "sell, exchange, lease, or otherwise dispose of" any property so acquired, but only to public authorities and only on condition that the property is used for public purposes. Clearly, lands expressly subjected to disposal by the Secretary of Agriculture, and only to public authorities for public purposes, could not at the same time be lands sub-

[5] Executive Order No. 7027, issued April 30, 1935, established the Resettlement Administration, which was vested with the functions and duties of initiating and administering "a program of approved projects with respect to soil erosion, * * *." On January 1, 1937, by Executive Order No. 7530, all of the powers, functions, duties and property of the Resettlement Administration were transferred to the Secretary of Agriculture. Executive Order No. 7908 covered all of those projects that had been transferred to him by the previous Executive Orders, and included "lands thereafter acquired." The land here in question was acquired for soil erosion projects after Executive Order No. 7530 transferring the projects to the Secretary of Agriculture had been issued. It is clear, therefore, from the face of the orders. that appellant's argument (Br. 8, 43) that there is no evidence to support a finding that Executive Order No. 7908 applies to this particular land is without merit.

ject to disposal under the general land laws to private individuals and for private gain.

The placing of these lands under the sole jurisdiction of the Secretary of Agriculture in and of itself repels any notion that such lands were subject to the general land laws or mineral laws of the United States. The administration of those laws traditionally is in the hands of the Secretary of the Interior, and the placing of this land under the Secretary of Agriculture shows Congressional intention that it be disposed of, if at all, only for purposes which he should determine upon under the Bankhead-Jones Farm Tenant Act. It is true that nine years later in 1946, Congress transferred to the Secretary of the Interior the function of control of mineral deposits in lands of this category. (Sec. 402 Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099; App. 16–17.) His authority, however, was conditioned upon his being advised by the Secretary of Agriculture that any contemplated disposition of minerals "will not interfere with the primary purposes for which the land was acquired, and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes." Appellant does not, of course, pretend that these conditions have been or can be met with respect to the land here involved. On the contrary, we proceed now to show that the materials which appellant seeks, long prior to the 1946 Reorganization Plan, had been otherwise disposed of by the Secretary of Agriculture.

In 1940, the Secretary of Agriculture exercised his powers under the Bankhead-Jones Farm Tenant Act

by entering into a licensing agreement for a period of fifty years with the State Highway Commission of Oregon. This gives the State the right to use materials from the land here involved for use for construction purposes (R. 7–8). It was not until after the state contractor was extracting volcanic cinders from the land that appellant, in 1951, made his location. Quite obviously, the licensing agreement with the State of Oregon was within the authority of the Secretary of Agriculture, and is valid. It follows that appellant could not acquire any rights to materials which previously had been disposed of. *United States* v. *Schaub*, 103 F. Supp. 873 (D. Alaska, 1952), affirmed *per curiam*, 207 F. 2d 325 (C. A. 9, 1953).[6]

CONCLUSION

It is submitted that the judgment should be affirmed.

Respectfully,

Perry W. Morton,
Assistant Attorney General.

C. E. Luckey,
United States Attorney, Portland, Oregon.

Roger P. Marquis,
Elizabeth Dudley,
Attorneys, Department of Justice, Washington, D. C.

June 1955.

---

[6] As in the *Schaub* case, it has been asumed that this volcanic material is a mineral within the meaning of the general mining laws.

APPENDIX

Executive Order No. 7908 June 9, 1938, 3 F. R. 1389, provides:

> TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF AGRICULTURE FOR USE, ADMINISTRATION, AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT
>
> WHEREAS I find suitable for the purposes of Title III of the Bankhead-Jones Farm Tenant Act, approved July 27, 1937 (50 Stat. 522, 525), and the related provisions of Title IV thereof, all lands of the United States now under the supervision of the Secretary of Agriculture (1) which have been acquired by the Department of Agriculture for use in connection with those land-development and land-utilization projects transferred to it by Ex. Order No. 7530 of Dec. 31, 1936, as amended by Ex. Order No. 7557 of Feb. 19, 1937 (including lands transferred to it by the said Ex. order, lands thereafter acquired pursuant to the said Ex. order, as amended, lands set apart and reserved from the public domain, and lands acquired by transfer from other Federal agencies, whether by Ex. order or otherwise), and (2) which are now in process of acquisition by the Dept. of Agriculture, pursuant to existing contracts of purchase and pending condemnation proceedings, for use in connection with the said projects:
>
> NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by section 45 of the said Bankhead-Jones Farm Tenant Act, it is ordered that all the right, title, and interest of the United States in the lands so acquired or in process of acquisition, be, and they are hereby, transferred to the Secretary of Agriculture for

use, administration, and disposition in accordance with the provisions of Title III of the said Act and the related provisions of Title IV thereof; and immediately upon acquisition of legal title to those lands now in process of acquisition, this order shall become applicable to all the additional right, title, and interest thereby acquired by the United States;

Provided, that no lands heretofore set apart and reserved from the public domain shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior;

And Provided further, that this order shall not apply to any of the said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife, waterfowl, migratory bird, or research refuge, or to the right, title, and interest of the United States in the mineral resources of those lands which have heretofore been set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public-land laws.

Secs. 31, 32, Title III of the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended by the Act of July 28, 1942, 56 Stat. 725, 7 U. S. C. sec. 1011, provides:

Sec. 31. The Secretary is authorized and directed to develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable

streams, and protecting the public lands, health, safety, and welfare.

Powers Under Land Program

Sec. 32. To effectuate the program provided for in section 31, the Secretary is authorized—

(a) To acquire by purchase, gift, or devise, or by transfer from any agency of the United States or from any State, Territory, or political subdivision, submarginal land and land not primarily suitable for cultivation, and interests in and options on such land. Such property may be acquired subject to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of this title.

(b) To protect, improve, develop, and administer any property so acquired and to construct such structures thereon as may be necessary to adapt it to its most beneficial use.

(c) To sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of this title, but any sale, exchange, or grant shall be made only to public authorities and agencies and only on condition that the property is used for public purposes: *Provided, however,* That an exchange may be made with private owners and with subdivisions or agencies of State governments in any case where the Secretary of Agriculture finds that such exchange would not conflict with the purposes of the Act, and that the value of the property received in exchange is substantially equal to that of the property conveyed. The Secretary may recommend to the President other Federal, State, or Territorial agencies to administer such property, together with the conditions of use and administration which will best serve the purposes of a land-conservation

> and land-utilization program, and the President is authorized to transfer such property to such agencies.
>
> (d) With respect to any land, or any interest therein, acquired by, or transferred to, the Secretary for the purposes of this title, to make dedications or grants, in his discretion, for any public purpose, and to grant licenses and easements upon such terms as he deems reasonable.
>
> (e) To cooperate with Federal, State, Territorial, and other public agencies in developing plans for a program of land conservation and land utilization, to conduct surveys and investigations relating to conditions and factors affecting, and the methods of accomplishing most effectively, the purposes of this title, and to disseminate information concerning these activities.
>
> (f) To make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary for the purposes of this title, in order to conserve and utilize it or advance the purposes of this title. Any violation of such rules and regulations shall be punished as prescribed in section 5388 of the Revised Statutes, as amended (U. S. C., 1934 ed., title 18, sec. 104).

Sec. 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, 5 U. S. C. secs. 133y–16, p. 140, 1952 Ed., provides:

> Sec. 402. *Functions relating to mineral deposits in certain lands.*—The functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to the provisions of the Act of March 4, 1917 (39 Stat. 1134, 1150, 16 U. S. C. 520), Title II of the National Industrial Recovery Act of June 16, 1933, (48 Stat. 195, 200, 202, 205, 40 U. S. C.

401, 403 (a) and 408), the 1935 Emergency Relief Appropriations Act of April 8, 1935 (48 Stat. 115, 118), section 55 of Title I of the Act of August 24, 1935 (49 Stat. 750, 781), and the Act of July 22, 1937 (50 Stat. 522, 525, 530), as amended July 28, 1942 (56 Stat. 725, 7 U. S. C. 1011 (c) and 1018), are hereby transferred to the Secretry of the Interior and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of the Interior as he may designate: *Provided,* That mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes. The provisions of law governing the crediting and distribution of revenues derived from the said lands shall be applicable to revenues derived in connection with the functions transferred by this section. To the extent necessary in connection with the performance of the functions transferred by this section, the Secretary of the Interior and his representatives shall have access to the title records of the Department of Agriculture relating to the lands affected by this section.

U. S. GOVERNMENT PRINTING OFFICE: 1955

No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

FILED

JUL 18 1955

PAUL P. O'BRIEN, CLERK

NORMAN N. GRIFFITH,
610 Pacific Building,
Portland 4, Oregon,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-55

SUBJECT INDEX

Page

Argument ... 1

Point A: The mining laws of the United States apply to "Lands Belonging to the United States" and that Statutory language applies to the land here involved. (Reply to Appellee's Point A) ... 1

Point B: Congress has never stated an intent that the mining laws of the United States should not apply to the land involved here. (Reply to Appellee's Point B) ... 7

Point C: The mineral deposits in the land here involved were not disposed of prior to appellant's location thereof, and every administrative action with respect to the land here involved has been expressly subject to Executive Order No. 7672 and the mining laws of the United States. (Reply to Appellee's Point C) ... 11

License Agreement ... 13

Conclusion ... 16

Appendix ... 17

TABLE OF CASES

Page

Jones v. United States, 195 F. 2d 707 (C.C.A. 9) 9
Lockhart v. Johnson, 181 U.S. 516, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979 3
Newhall v. Sanger, 92 U.S. 761, 23 L. Ed. 769 .... 1, 4
Oklahoma v. Texas, 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406 5
State v. Cunningham, 35 Mont. 547, 90 P. 755 4
United States v. Blendaur, 128 Fed. 910 (C.C.A. 9) 2
United States v. Holliday, 24 F. Supp. 112 9
United States v. Schaub, 103 F. Supp. 873, affd. per curiam, 207 F. 2d 325 (C.C.A. 9) 15
Verdier v. Railroad Company, 15 South Carolina 476 5

STATUTES

Act of July 26, 1866, c. 262, sec. 1, 14 Stat. 251 .... 3, 4, 5
Act of May 10, 1872, c. 152, sec. 1, 17 Stat. 91 .... 3, 4, 5
Act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497 8
Act of August 24, 1935, ch. 641, sec. 55, 49 Stat. 750 7
34 Stat. 344, 43 U.S.C. sec. 153 5
7 U.S.C. sec. 1000 *et seq.* 11
7 U.S.C. sec. 1011 (c) 12
30 U.S.C. sec. 22 .... 1, 3, 5
43 U.S.C. sec. 141 and 142 .... 8, 10, 15, 16
43 U.S.C. sec. 153 10
48 U.S.C. sec. 341 15

EXECUTIVE ORDERS

Executive Order No. 7672 .... 7, 8, 9, 10, 11, 12, 13, 15, 16
Executive Order No. 7908 .... 11, 12, 13
Executive Order No. 8531 .... 11, 12

MISCELLANEOUS AUTHORITIES

50 Har. L. Rev. 897 3
40 Op. A.G. 73 9

No. 14661

United States

COURT OF APPEALS

for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

ARGUMENT

POINT A: The mining laws of the United States apply to "lands belonging to the United States", and that statutory language applies to the land here involved. (Reply to Appellee's Point A)

The dispute in this case is over a narrow question of law: was the court below in error in reading into the phrase found in 30 U.S.C. sec. 22 "lands belonging to the United States" the concept that the phrase does not

extend to land once patented and thereafter "reacquired" by the United States?

This is a case of the first impression and prior dictas in relation to other problems not particularly helpful. Appellee quotes a statement from Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769 (1875):

> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Appellee's Br. 4.

This statement leaves undecided the very question for decision: whether or not the land here involved is "subject to sale or other disposal under the general land laws", to-wit, under the mining laws of the United States. None of the cases which reaffirms the Newhall dictum are in the least helpful in deciding whether the particular land involved here was meant by Congress to be subject to mineral entry under the mining laws of the United States. None of them deal with the mining laws.

In United States v. Blendaur, 128 Fed. 910 (C.C.A. 9), this court cited practically every case cited by appellee in its brief at page 4, and said as to certain lands ceded by the Flathead Indians and "acquired" by the United States:

> "The contention of the appellee that they were not public lands, because these lands indicate only such lands belonging to the United States as are subject to sale or other disposition under general laws. (Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, L. & G. R. Co. v. United States, 92 U.S. 733, 23 L. Ed. 634; Newhall v. Sang-

er, 92 U.S. 761, 23 L. Ed. 769; Bardon v. R. R. Co., 145 U.S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Mann v. Tacoma Land Co., 153 U.S. 273,, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U.S. 481, 491, 21 Sup. Ct. 690, 45 L. Ed. 963), cannot be sustained. The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In United States v. Bisel, 8 Mont. 20, 30, 19 Pac. 251, the court after referring to the decision in Wilcox v. Jackson, Newhall v. Sanger and other cases said:

" 'There is no statutory definition of the words "public lands", and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use.' " (p. 913)

Here our starting point is that the mining laws "have been construed very liberally in favor of the miners." Davis, *Fifty Years of Mining Law,* 50 Har. L. Rev. 897, 900. Presumptively the land involved here is open to entry unless there has been some express provision to the contrary. Lockhart v. Johnson, 181 U.S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979.

Appellee attempts to shrug off the fact that the decisive words in the Act of May 10, 1872, which is now 30 U.S.C. sec. 22, "lands belonging to the United States" represent a change from the language used in the preceding mining law, Act of July 26, 1866, c. 262, sec. 1,

14 Stat. 251: "mineral lands of the public domain." Unless Congress was completely futile in making the change, the new language in the Act of May 10, 1872 either broadened or clarified the language of the preceding act. By the change Congress clearly adopted one definition of "public domain" i.e. territory belonging to the general government. State v. Cunningham, 35 Mont. 547, 90 P. 755.

If Representative's Sargeant's opinion that the Act of May 10, 1872 did not "make any important changes in the mining laws as they have heretofore existed" is correct, then the change by Congress must have clarified the meaning of the earlier act and the language "lands of the public domain" always meant "lands belonging to the United States." This is consistent with appellee's own case, Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769, where the term "public lands" was held to apply only to the land where "the complete title was absolutely vested in the United States."

"Acquired" land meets that test and the distinction the court below drew between "acquired" and "never-patented" public lands is untenable, particularly under the present wording of the statute. Whatever is the exact scope of the phrase "lands belonging to the United States", it is clear that it does not distinguish between "acquired" and "never-patented" public land.

The decision of the court below was based on this distinction:

> "Such 20 acre tract is not in the public domain but is acquired land not subject to mineral entry." Conclusion of Law IV, R. 22.

Consequently the court was in error when it adjudged appellant's mining claim null and void.

Oklahoma v. Texas, 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406, does not deal with acquired land and the statement appellee quotes is a dicta made with respect to the disposition of public land which had never been patented. Appellee's Br. 4. Here, unlike in the Oklahoma case there is not a series of special statutes showing Congress' intent that the mining laws are not to apply. See appellant's opening brief, pages 33 through 35 for a full statement.

Often the most significant things about an appellee's brief are the points made in appellant's brief which are not answered at all. Appellee does not answer authorities cited by appellant at pages 30 through 33 of his brief. First, no answer is made to appellant's contention that Congress itself has construed 30 U.S.C. sec. 22 to cover acquired lands. 34 Stat. 344, 43 U.S.C. sec 153. Appellant's Br. 30.

Second, there is no answer to appellant's argument that acquired lands were an old problem of which Congress was aware when the Act of May 10, 1872, c. 152, sec. 1, 17 Stat. 91, was passed. Appellant's Br. 30-31.

Finally, appellee fails to either cite or distinguish Verdier v. Railrod Company, 15 South Carolina 476. This is the controlling case here. The court there held that the railroad grant section of the earlier mining law, Act of July 26, 1866, 14 Stat. 251, extended to lands acquired by the United States by Civil War taxation in the States of the Confederacy. The court specifically re-

jected the argument that "public lands" as used in that statute did not apply to lands previously granted and owned as private property. See Appellant's Br. 31-33.

Appellee has not shown why Congress does not intend that the mining laws should apply to this metalliferous 20 acre tract which the parties have agreed "is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface, said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." Agreed Fact VI, R. 6. Appellee would construe the words "lands belonging to the United States" so that a different result would be reached on two identical 20 acre tracts both owned by the United States and lying side by side on some sage brush butte solely upon the basis of the accidental fact that one tract has been "reacquired" by the United States.

POINT B: Congress has never stated an intent that the mining laws of the United States should not apply to the land involved here. (Reply to Appellee's Point B)

It was an agreed fact that:

> "The President had authority under said Emergency Relief Appropriations Act of 1935 and under the act of August 24, 1935, (49 Stat. 115) to make the disposition of all of said lands including said Section 13 as was made by said Executive Order (No. 7672)". Agreed Fact XI R. 9. (Insertion added)

The Act of August 24, 1935, ch. 641, sec. 55, 49 Stat. 750, 781 provides in part:

> "There is hereby made available, out of any money appropriated by the Emergency Relief Appropriation Act of 1935, such amount as the President may allot for the development of a national program of land conservation and *land utilization.*" (Emphasis supplied)

After the land in question was acquired, the President issued Executive Order No. 7672 disposing of it. In view of the nature of this particular land he recognized that mining thereon was not inconsistent with the Central Oregon Land Project and so gave the direction that the "mineral resources" of lands were open to development "under the applicable laws." This was his program of "utilization" for this land.

Appellee has no explanation why the particular section of land here involved, Section 13, T. 11 S, R. 12 E. was listed in Executive Order No. 7672 if the order was not to apply to it. Appellant in his opening brief has analyzed Executive Order No. 7672 phrase by phrase and has demonstrated how each phrase is consistent with, indeed, requires the conclusion that the President

recognized the right of mineral entry as to the land here involved. Appellant's Br. 13-16. Appellee does not answer this detailed analysis but instead assumes its own construction without any explanation.

Section 1 of Executive Order No. 7672 does two things: first and most important, it lists all the land being transferred into the Central Oregon Land Project; and second, it provides that insofar as Executive Order No. 6910 temporarily withdrew from entry some of those enumerated and described lands it was revoked. The President throughout Executive Order No. 7672 and particularly in Section 2 used the words "public lands" in the sense of all government owned land listed in the order by their legal descriptions. Otherwise Section 13 of T. 11 S. R. 12 E. was never placed in the Central Oregon Land Project since it consists of nothing but "acquired land". P. 32. By section 2 of the order the withdrawal of Section 13 is made subject to the conditions stated in the Act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, 43 U.S.C. sec. 141 and 142. That condition is that the land withdrawn shall at all times be open to discovery under the mining laws of the United States.

Appellant has pointed out that the choice by the President to act under his statutory withdrawal powers requires the land so withdrawn to remain open to mineral entry. Withdrawal Act, 43 U.S.C. sec. 141 and 142; Appellant's Br. 17-22. The appellee does not explain why the land is not subject to mineral entry under the provisions of that statute, in view of its express language.

The appellee is equally embarrassed by an opinion of its Attorney General, 40 Op. A.G. 73. See Appellant's Br. 20-22. After a lengthy consideration of the whole problem of withdrawals, the Attorney General there concluded that if the President withdraws land under his statutory powers, the right of mineral entry continues; while if the withdrawal order is issued under his non-statutory powers, the right of mineral entry does not continue. Here Executive Order No. 7672 expressly recites that the President was acting under his statutory powers. See text thereof set out in Appellant's Brief at pages 11-13.

The government officials concerned have not seen fit to follow this simple and understandable rule. There is nothing in the Attorney General's opinion to the effect that the land there involved was *unpatented* public domain. The opinion simply says "public domain", an ambiguous phrase which may refer to all land owned by the United States. A reading of the opinion indicates that the Attorney General is stating a comprehensive rule as to all withdrawals of government land by the President.

Appellee cites United States v. Holliday, 24 F. Supp. 112, and Jones v. United States, 195 F. 2d 707, 709 (C.C.A. 9). The Holliday case is discussed at page 33 of appellant's opening brief and is not in point here since it does not involve the effect of Executive Order No. 7672 nor the construction of the mining laws of the United States. The Jones case has no application since appellant here claims a metalliferous placer claim. See footnote in the Jones case page 709. (195 F. 2d 707, 709)

It was an agreed fact that the cinders involved here "consist principally of silicon, aluminum, potassium, sodium, iron, calcium and magnesium." Agreed Fact V, R. 5. No question exists that appellant "discovered the mineral deposit of cinders on said 20 acres." And that the "deposit of cinders has a commercial value." Agreed Facts V and VII, R. 5-6.

The President when he issued Executive Order No. 7672 decided that there was no inconsistency between the purposes of the Central Oregon Land Project and development of the minerals under the applicable laws. It has previously been pointed out that Congress has not indicated that the mining laws are not to apply to "acquired" lands. On the contrary Congress itself has regarded those laws as applicable to "acquired" land. 43 U.S.C. sec 153. Any other construction would lead to absurdity in treating identical land lying side by side differently. The President recognized this in his order, and clearly regards this so-called "acquired" land as "public land" and provides that its withdrawal should be subject to the conditions stated in the Withdrawal Act, 43 U.S.C. sec 141 and 142, namely that all lands withdrawn under that act should be open to discovery under the mining laws of the United States. Executive Order No. 7672, sec. 2.

POINT C: The mineral deposits in the land here involved were not disposed of prior to appellant's location thereof, and every administrative action with respect to the land here involved has been expressly subject to Executive Order No. 7672 and the mining laws of the United States. (Reply to Appellee's Point C)

Executive Order No. 7672 refers to the land here involved by specific legal description: Section 13, T. 11 S. R. 12 E. Willamette Meridian. Appellee does not even suggest that this order has ever been revoked.

Appellee claims that the land here involved was transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Farm Tenant Act, 7 U.S.C. sec. 1000 *et seq.*, by Executive Order No. 7908. There is no evidence in the record showing that the particular land here involved was transferred by that order. Appellee concedes this and instead relies upon a series of general executive orders to connect Executive Order No. 7908 with this land. Appellee's Br. 10.

Assuming *arguendo* only that the land was transferred by Executive Order No. 7908 the text of the order specifically excludes from its operation the rights of mineral entry. Said order was retroactively amended by Executive Order No. 8531. Hence the text as set out in appendix to appellee's brief is obsolete. (See appendix to this brief.)

The order as amended states in part:

> "*And provided Further* * * * that this order, or any order which may hereafter set apart and reserve land from the public domain for use, the administration, for disposition in accordance with the provisions of Title III of said Bankhead-Jones Farm

> Tenant Act and the relative provisions of Title IV thereof, shall not apply to the right, title and interest of the United States in the mineral resources of the land which have been, or may hereafter be set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public land laws."

In this confusion of orders one fact is clear: Executive Order No. 7672 is not revoked by Executive Order 7908 nor by any other Executive Order and remains in full force and effect.

Assuming *arguendo* only that the land here involved was transferred to the Secretary of Agriculture pursuant to the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 526, 7 U.S.C. sec. 1011(a) then the Secretary acquired it "subject to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of sections 1001-1005d, 1007, and 1008-1029 of the title." It follows then that the Secretary acquired it subject to the prior provisions of Executive Order No. 7672, which has never been modified or revoked.

The language in 7 U.S.C. sec. 1011(c) which appellee quotes to disposal to public authorities is inapplicable here for two reasons: (1) it only applies to a disposition by the Secretary of Agriculture and not by other officials; and (2) entry under the mining laws pursuant to the proviso in Executive Order No. 7672 is not a disposal at all in the sense of Section 1011(c) since the mineral entry rights were never transferred to the Secretary at all. Appellee's Br. 10. In short, if the Secretary took, he took

subject to the proviso in Executive Order No. 7672 continuing the rights of mineral entry.

This was, in fact, the way the Secretary of Agriculture construed the situation when he entered into the 1940 License Agreement: he excepted from the agreement the rights of mineral entry as protected and continued by Executive Order No. 7672. Ex. 6, pp. 4-5. It is interesting to note that Executive Order No. 7908 was dated June 10, 1938. The license agreement which defers to Executive Order No. 7672 is dated April 19, 1940, and makes no reference to Executive Order No. 7908.

Since even the Secretary of Agriculture regarded himself as bound by Executive Order No. 7672, it is not apparent how any shuffling of the administration of the land here involved between various government bureaus can affect the substantive rights of the appellant under the terms of Executive Order No. 7672 and the mining laws of the United States. The Secretary as a subordinate of the President is in no position to reverse the determination of the President in Executive Order No. 7672 that the lands in the Central Oregon Land Project were to be open to mineral entry and that such entry does not interfere with the primary purpose for which that land was acquired. Nor can the subordinate Secretary impose conditions different than those the President himself has imposed.

LICENSE AGREEMENT

This case arose only after appellant brought a suit in equity in the state courts to enjoin the operations of one F. C. Somers who was removing cinders from appellant's

claim. R. 8. *There is no basis in the record, and none is cited by appellee; and it is in fact untrue that F. C. Somers was extracting cinders from the land prior to appellant's location thereof.* Appellee's Br. 12.

Somers was a contractor with the State of Oregon and did remove cinders from the land but *after* appellant's location thereof. The land in question here was subject to a licensing agreement with the State of Oregon made in 1940. The 20 acres involved here was only a small part of the land covered by the agreement. Ex. 6 (See Exhibit A thereto).

This licensing agreement reserved to the United States:

> "All rights to the oil, gas, coal and other mineral ores whatsoever upon, in, or under said property, together with the usual mining rights, powers and privileges, including the right of access to and use of such parts of the surface of the premises as may be necessary for mining and saving said minerals." Ex. 6, p. 3.

The agreement, however, granted a narrowly restricted right to the State of Oregon "to use stone, gravel, and similar substances from said property, provided such materials are used for construction purposes or in connection with said property." Ex. 6, p. 4. Appellant denies that F. C. Somers was extracting cinders "for construction purposes *upon* or *in connection with said property*"; and the appellee offered no evidence to that effect. (Emphasis supplied)

However, it is unnecessary here to decide whether F. C. Somers was exercising any rights of the licensee State

of Oregon since the licensing agreement expressly subjects any rights of the State of Oregon to the right of mineral etnry by persons such as appellant:

> "It is provided, however, insofar as the land subject to this agreement consists of public domain reserved for use in connection with the project by Executive Order No. 7672, dated July 19, 1937, that nothing in this agreement shall be construed to restrict the disposition of mineral resources contained in such lands under the public land laws of the United States." Ex. 6, p. 4.

The license agreement thus recognizes, as it had to, that the agreement by the Secretary of Agriculture could not alter the provision which the President had made in Executive Order No. 7672 allowing the right of mineral entry in the land listed in the order.

Since here both the licensing agreement and the Executive Order No. 7672 expressly continue the right of mineral entry, the case of United States v. Schaub, 103 F. Supp. 873, *aff'd per curiam,* 207 F. 2d 325 (C.C.A. 9) is not in point. In that case the withdrawal order had no such explicit saving proviso and was issued under 48 U.S.C. sec. 341. That section expressly provides that the right of mineral entry should not continue. Here the withdrawal order was issued under the Withdrawal Act, 43 U.S.C. sec. 142 which expressly states that the right of mineral entry should continue. Here the State's rights and those of any contractor with it were subject to the provisions of Executive Order No. 7672 which is in effect incorporated by reference in the licensing agreement.

CONCLUSION

Appellant validly located a mining claim upon the land in question since it was open to entry under the express terms of Executive Order No. 7672, the Withdrawal Act, 42 U.S.C. sec 142, and the mining laws of the United States. The court below was, therefore, in error and its judgment should be reversed.

Respectfully submitted,

Norman N. Griffith
Attorney for Appellant.

APPENDIX

EXECUTIVE ORDER

AMENDING EXECUTIVE ORDER NO. 7908 of JUNE 9, 1938, TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF AGRICULTURE FOR USE, ADMINISTRATION, AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT.

By virtue of the authority vested in me by section 45 of the Bankhead-Jones Farm Tenant Act, approved July 22, 1937 (50 Stat. 522), I hereby amend the two provisos contained in Executive Order No. 7908[1] of June 9, 1938, transferring certain lands to the Secretary of Agriculture for use, administration and disposition under Title III of the Bankhead-Jones Farm Tenant Act, to read as follows:

> "*Provided,* that no lands heretofore or hereafter set apart and reserved from the public domain for use, administration, and disposition in accordance with the provisions of Title III of the said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior, and no transfer of title to such lands shall be complete unless evidenced by patent issued by the General Land Office;
>
> "*And provided further,* that this order shall not apply to any of said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife,

[1] 3 F.R. 1389.

waterfowl, migratory bird, or research refuge, and that after this order, or any order which may hereafter set apart and reserve land from the public domain for use, administration, and disposition in accordance with the provisions of Title III of said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall not apply to the right, title, and interest of the United States in the mineral resources of the lands which have been, or may hereafter be, set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public land laws."

FRANKLIN D. ROOSEVELT

The White House

Aug. 31st, 1940

(No. 8531)

(F.R. Doc. 40-3685; Filed September 3, 1940; 3:50 p.m.)

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

M. D. MacRAE, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

JEFF MORRISON, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

APPELLANTS' BRIEF

Appeals from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

K. C. Tanner and
Richard R. Carney,
1041 Pacific Bldg., Portland 4, Oregon,
Attorneys for Appellants.

Wood, Matthiessen, Wood & Tatum,
John D. Mosser,
1310 Yeon Bldg., Portland 4, Oregon,
Gunther F. Krause,
916 Portland Trust Bldg., Portland 4, Oregon,
Attorneys for Appellee.

FILED
JUN 14 1955
PAUL P. O'BRIEN, CLERK

STEVENS-NESS LAW PUB. CO.

SUBJECT INDEX

Page

Jurisdiction of District Court ... 1

Jurisdiction of Court of Appeals ... 2

Statement of the Case ... 2

Consolidation of Cases on Appeal ... 5

Specifications of Error ... 5

Summary of Argument ... 13

Argument:

I The Picketing was not Wrongful Conduct ... 15

II Picketing for "Unlawful Purpose" ... 23

III Damages Were Not Proximately Caused by the Picketing ... 28

IV The Class Suit and Form of Decree ... 33

APPENDICES

A Pre-Emption Cases Decided in the Supreme Court i

B Title 29 U.S.C.A. Sec. 113 (a) (b) and (c) ... ii

C A. L. I. Restatement of Torts ... iv

D Title 29 U.S.C.A. Sec. 157 ... v

E Title 29 U.S.C.A. Sec. 158 (b) ... vi

F Title 29 U.S.A.C. Sec. 152 ... ix

INDEX TO AUTHORITIES

Table of Cases

Page

Allen-Bradley Local etc. v. Wisconsin Employment Relations Board (1942) 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 ..... 21, 22

Amalgamated Asso. v. W. E. R. B., 340 U.S. 383, 71 S. Ct. 359 i

American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 17

Bakery and Pastry Workers and Helpers Local 802 v. Wohl, 315 U.S. 769, 62 S. Ct. 118, 86 L. Ed. 1178 17

Baker Hotel v. Employees Local, 187 Or. 58, 207 P. 2d 1129 28

Benz et al v. Compania Naviera Hidalgo, S.A. 205 F. 2d 944 4

Bethlehem Steel v. N. Y. S. L. R. B., 330 U.S. 767, 67 S. Ct. 1026 i

Building Service Employees International v. Gazzam, 339 U.S. 532, 70 S. Ct. 784 26

Cafeteria Employees Union Local 302 v. Angelos (also called Angelos v. Mesevich) 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58 17

Carlsen v. California, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 17

Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807 ..... 18, 27

Cousins v. Taylor, 115 Or. 472, 239 P. 2d 96 34

Cumberland Building & Loan Asso. v. Sparks (CC ED Ark. 1900) 106 F. 101 28

Diamond Full-Fashioned Hosiery Co. v. Leader, 20 F. Supp. 467 24

INDEX TO AUTHORITIES (Cont.)

Page

Erie Railroad v. Tompkins, 304 U.S. 64, 58 S. Ct. 819 36

Garner v. Teamsters etc., 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228 .... 19, 21

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684 .... 18, 27

Hughes v. Superior Court of California, 339 U.S. 460, 70 S. Ct. 718 .... 18, 27

International Union v. O'Brien, 339 U.S. 454, 70 S. Ct. 781 .... 20, i

International Union v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S. Ct. 516 21

La Cross Telephone Corp. v. W.E.R.B. 336 U.S. 18, 69 S. Ct. 379 i

Markham & Callow v. International Woodworkers, 170 Or. 517, 135 P. 2d 727 25

Matson Navigation Co. v. Seafarers Union, 100 F. Supp. 720, 29 LRRM 2364 24

Montgomery Ward & Co. v. Langer, 168 F. 2d 182 35

Montgomery Ward & Co. v. Northern Pacific Terminal et al., 32 LRRM 2386 30

National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U.S. 240, 59 S. Ct. 490, 83 L. Ed. 627 21

National Labor Relations Board v. Illinois Bell Telephone Co., 189 F. 2d 124, 28 LRRM 2097, cert. den. 344 U.S. 885 31

National Labor Relations Board v. Rockaway News Supply Co., 197 F. 2d 111, 30 LRRM 2119 31

New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 24

INDEX TO AUTHORITIES (Cont.)

Page

New York Dock Co. v. The Poznan, 274 U.S. 117, 47 S. Ct. 482 32

Old Point Fish Co. v. Haywood, 109 F. 2d 703 32

Peters v. Central Labor Council, 179 Or.1, 169 P. 2d 870 .... 18, 28

Plankinton v. W. E. R. B., 338 U.S. 953, 70 S. Ct. 491 i

Schwab v. Motion Picture Operators, 165 Or. 602, 109 P. 2d 600 26

Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 17

Starr v. Laundry Union, 155 Or. 634, 63 P. 2d 1104 .. 28

State v. Dobson, 195 Or. 533, 245 P. 2d 903 26

Stone Logging Co. v. International Wooodworkers, 171 Or. 13, 175 P. 2d 759 .... 25, 26

Thornhill v. Albama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 17

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025 i

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762 33

Wallace v. International Asso., 155 Or. 652, 63 P. 2d 1090 28

Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 386 20

Wilson & Co. v. Birl, 105 F. 2d 948 24

FEDERAL STATUTES

Page

28 U.S.C.A. Sec. 1332, subpar. (a) (2) 1
28 U.S.C.A. Sec. 1252 2
28 U.S.C.A. Sec. 1291 2
29 U.S.C.A. Sec. 101 et seq., 47 Stat. 70 et seq. 2, 17
29 U.S.C.A. Sec. 113, 47 Stat 70 et seq. .... 23, ii
29 U.S.C.A. Sec. 141 et seq., 61 Stat. 136 .... 2, 18
29 U.S.C.A. Sec. 151, et seq., 49 Stat. 449 18
29 U.S.C.A. Sec. 152 ix
29 U.S.C.A. Sec. 157, 61 Stat. 140 .... 19, v
29 U.S.C.A. Sec. 158, 61 Stat. 140 .... 19, vi

OREGON STATUTES

O.C.L.A. Sec. 102-902 17

TEXTS

A. L. I. Restatement of Torts, Secs. 775, 777, 794 27, iv

29 A. L. R. 2d 360 24

15 Am. Jur., Damages, Sec. 40, p. 439 32

19 Am. Jur., Equity, Sec. 132, p. 132 28

Vol. 4 Benedict on Admiralty, 6th Ed., Sec. 622, p. 285 32

17 C. J., Damages, Sec. 96, p. 767 32

25 C. J. S., Damages, p. 476 29

Cox, Federation in Labor Law, 67 Harvard Law Review 1297, 1327 22

Vol. 3 Moore's Federal Practice, Sec. 23:11 34

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MacRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLANTS' BRIEF

Appeals from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

JURISDICTION OF THE COURT

The plaintiff, who is the appellee, contends that the District Court had jurisdiction based upon the provisions of Title 28 U.S.C.A. Sec. 1332, subparagraph (a) (2) in that the action is between citizens of a state of the United States and a citizen of a foreign state. The

appellee is a Panamanian corporation, and the appellants are citizens of the States of Oregon and California (Tr. 14).

The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

The appellants contend, as will be pointed out in their Specifications of Error and Argument in this brief, that although the District Court had jurisdiction to hear the action under the foregoing section, that the court was deprived of jurisdiction to enter judgment for the appellee because of the provisions of the Norris-LaGuardia Act, Title 29 U.S.C.A. Secs. 101 et seq., and the National Labor Relations Act as amended by the Labor Management Relations Act, Title 29 U.S.C.A. Secs. 141 et seq.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeals to review the judgment of the District Court is based upon Title 28 U.S.C.A. Sec. 1291, it being a final decision of the District Court, a direct review of which may not be had in the Supreme Court under Title 28 U.S.C.A. Sec. 1252.

STATEMENT OF THE CASE

These cases involve the right of the appellee, a Panamanian corporation and owner of a Liberian flag cargo vessel, to recover from the appellants damages on account of the idleness of the vessel during the period of time that it was being picketed by the appellants.

The SS RIVIERA was an American-built Liberty ship, owned by the appellee and operated under the flag of the Republic of Liberia. Between March and August of 1952 the crew members signed Articles aboard the vessel for a period of two years. Under these Articles the crew members made a voyage from Bremen, Germany, to New Orleans, Louisiana, and from New Orleans, Louisiana, to the Orient, and then to the Port of Portland, Oregon, where it arrived on September 3, 1952. The vessel was to receive certain repairs at Portland, Oregon, and was to pick up a cargo of wheat for carriage to India. On September 9, 1952, practically all of the crew members went on strike and demanded their pay and their transportation to their respective ports of engagement (Tr. 472). From that date until October 14, 1952, the former crew members or their friends other than the appellants herein picketed the vessel. From October 14, 1952, until November 26, 1952, members of the Sailors' Union of the Pacific picketed the vessel until enjoined by the District Court on November 26, 1952. From November 28, 1952, until December 8, 1952, members of the Masters, Mates & Pilots Union picketed the vessel, and from December 10, 1952 until December 12, 1952 members of the Seafarers' International Union established a picket line at the vessel.

The picketing was peacful. The employees of the stevedoring and ship repair firms and other shore employees ordered to work on the vessel refused to work while the pickets were present. After removal of the picket lines, those employees resumed their work on the vessel.

The shipowner brought these separate suits as class suits against certain individual members of the unions involved and all members of each union as a class. In its complaint the appellee sought an injunction against the picketing and also sought damages. The District Court allowed temporary injunctions and appeals were taken to this court. The appeals were dismissed on the ground that the injunctions were moot because the vessel has departed. *Benz, et al. v. Compania Naviera Hidalgo,* 205 F. 2d 944. The causes were remanded to the District Court for further proceedings with the following admonition by this court:

> " * * * that what was determined by the Court below in issuing such injunctions is without further force or effect, and cannot be relied upon as res adjudicata, as creating an estoppel, or as the law of the case, all to the end that the issues relating to the claim of damages may be tried by the parties as free from the effects of such injunctions, as if the same had not been issued."

The three cases were tried together in the District Court on the question of damages. The court allowed a decree for damages in favor of the shipowner and against certain individual members of the unions and allowed the judgments to run against the assets of the three unions.

The alleged wrongful conduct for which the District Court awarded damages consisted of the picketing of the appellee's vessel, the SS RIVIERA, while it was docked at the Port of Portland, Oregon, subsequent to October 14, 1952.

The District Court held that the conduct of the appellants in picketing was wrongful and not pursuant to a labor dispute in that it was for an "unlawful purpose", to-wit: to induce the appellee to rehire its former crew members who had been discharged because of their refusal to work. (Findings of Fact XII, Tr. 242, 329, 375) (Conclusions of Law III, Tr. 245, 332, 379).

CONSOLIDATION OF CASES ON APPEAL

The three separate cases involved herein have been consolidated for purposes of appeal (Tr. 3). All three cases were brought for injunctions and damages on account of the picketing of appellee's vessel. Since the cases were decided by the District Court without a jury, the Specifications of Error will run to the Findings of Fact and Conclusions of Law made by the District Court in each case.

Also since the Findings and Conclusions are practically identical, we shall make but one detailed set of Specifications of Error. This will run in the Benz case, No. 14663. We will then indicate the corresponding Finding or Conclusion in the other two cases for which error is specified upon the same ground.

SPECIFICATIONS OF ERROR

1. The court erred in making Finding of Fact No. IX (Tr. 240) in finding that the crew members of the SS RIVIERA "went on strike for the sole purpose of cutting down the term of their service from two years,

the length of service agreed upon in their articles, and to obtain a higher wage rate and other conditions more favorable to them than those agreed upon in said articles", in that the evidence clearly shows that the members of the crew of the SS RIVIERA went on strike on account of their belief that said vessel was unseaworthy and when they ceased to work they demanded their wages which were then due and their transportation to their ports of engagement.

MacRae case Finding of Fact No. IX (Tr. 327).
Morrison case Finding of Fact No. IX (Tr. 373).

2. The court erred in making Finding of Fact No. XII (Tr. 242) in finding that the picketing by the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA and was for the sole purpose of compelling the appellee to reemploy the crew members who went on strike and were discharged, at more favorable wage rates and conditions, for the reason that the evidence clearly shows that the Sailors' Union of the Pacific picketed the vessel for the purpose of publicizing its labor dispute with the appellee and to further its economic interest in the trade in which the appellee was engaged, and said picketing by the Sailors' Union of the Pacific was for the purpose of gaining recognition as collective bargaining agent and to secure representation of the seamen to be employed aboard the vessel.

Further in the MacRae case (Finding of Fact No. XII, Tr. 329) and in the Morrison case (Finding of Fact No. XII, Tr. 375) the court further erred in finding that

the picketing by the members of the union was intended to help the Sailors' Union of the Pacific in obtaining its objectives after it had been restrained from picketing, on the ground and for the reason that there is absolutely no evidence to sustain said finding.

And further in the MacRae case (Finding of Fact No. XII, Tr. 329) the court erred in finding that the vessel's officers were not offered membership in Local 90 nor were any of them eligible for membership in Local 90 for the reason that there is no evidence to that effect, but on the contrary the evidence clearly shows that said officers could have joined said union.

3. The court erred in making Finding of Fact No. XIII (Tr. 242) in which the court found that the picketing by the appellants was the "sole and proximate cause of such loss of use" of the vessel, and further in finding that the appellee "was not deprived of the use of the SS RIVIERA by any technical custody of the United States Marshal during said period", for the reason that the loss of the use of the vessel during the period was caused by the independent intervening acts of the longshoremen and shipyard workers in refusing to cross the picket line, and for the further reason that the appellee did not have a crew aboard the vessel except for a few officers, and further for the reason that said vessel was in the custody of the Marshal pursuant to a libel and was not redeemed by the appellee.

MacRae case Finding of Fact No. XIII (Tr. 329).
Morrison case Finding of Fact No. XIII (Tr. 375).

4. The court erred in making Finding of Fact No. XIV (Tr. 243) wherein the court found that there was no labor dispute between the parties or otherwise at the time of the picketing, for the reason that a labor dispute did exist between the parties and between the crew members with respect to wages and working conditions aboard the vessel, and with respect to the recognition of the Sailors' Union of the Pacific as the bargaining agent of the employees aboard the vessel, and with respect to the economic interests of the Sailor's Union of the Pacific in the operation of appellee's vessel.

> MacRae case Finding of Fact No. XIV (Tr. 330).
> Morrison case Finding of Fact No. XIV (Tr. 376).

5. The court erred in making Finding of Fact No. XVII (Tr. 244) wherein it found that as the proximate result of appellants' picketing the appellee suffered both measurable and immeasurable damages, for the reason that said picketing was not wrongful and further any damages sustained by the appellee in the idleness of its vessel were not proximately caused by the picketing by the appellants, and further that said picketing was pursuant to a labor dispute, and if any damages were sustained as a result thereof, that they are damnum absque injuria.

> MacRae case Finding of Fact No. XIX (Tr. 331).
> Morrison case Finding of Fact No. XV (Tr. 376).

6. The court erred in making Conclusion of Law No. I (Tr. 244) wherein the court concluded that it had jurisdiction of the subjcet matter of this suit, and further that the appellee had no remedy under the National

Labor Relations Act as amended by the Labor Management Relations Act of 1947, and that the court was not deprived of jurisdiction by such remedy, on the ground and for the reason that the conduct complained of by the appellee consisted of a labor dispute affecting commerce, and that therefore the legality of the conduct is determined by the provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. Furthermore, should said conduct be in violation of said law, the remedies provided in said Act are exclusive.

Also the District Court was deprived of jurisdiction because of the provisions of the Norris-LaGuardia Act which divested the District Court of jurisdiction on account of the existence of a labor dispute.

MacRae case Conclusion of Law No. 1 (Tr. 332).
Morrison case Conclusion of Law No. I (Tr. 379).

7. The court erred in making Conclusion of Law No. III (Tr. 245) wherein the court concluded that the picketing "was for an unlawful purpose" and wherein the court further concluded that there was no labor dispute between the parties or between the union and any members or former members of the crew of the vessel, and further the court erred in concluding that there was no labor dispute within the definition of any federal statute, and that the picketing was not a lawful exercise of the right of free speech.

The court erred in making said conclusions for the reason that said picketing was for a lawful purpose in furtherance of appellants' labor disputes with the appel-

lee, and further that the purpose of said picketing was not unlawful in that it did not seek to require the appellee to do anything that it could not lawfully do.

MacRae case Conclusion of Law No. III (Tr. 332).
Morrison case Conclusion of Law No. III (Tr. 379).

8. The court erred in making Conclusion of Law No. IV (Tr. 245) wherein it concluded that the picketing "was the sole proximate cause" of appellee's damages, and that the failure of the employees of the independent contractors to cross the picket line was not an independent, intervening cause of the damages, for the reason that the appellee's damages were caused by its own failure to release the vessel from the custody of the Marshal, and its own failure to have a crew aboard the vessel during the period of the picketing and claimed damages, and its own failure to require the employees of its independent contractors to perform their contracts aboard the vessel. Also the acts of the employees of the independent contractors in refusing to cross the picket line were independent intervening causes of appellee's damages.

MacRae case Conclusion of Law No. V (Tr. 333).
Morrison case Conclusion of Law No. IV (Tr. 379).

9. The court erred in making Finding of Fact No. III (Tr. 238) and Conclusion of Law No. II (Tr. 244) wherein the court held that the members of the Sailors' Union of the Pacific had "sufficiently identical interests in the subject matter of this suit to constitute a class

subject to suit by service on representatives" and wherein the court concluded that "the court has jurisdiction of the parties" and this "a true class suit", and that the individuals Benz and Williams are representatives of the class for the reason that all members of the Sailors' Union of the Pacific do not sail in the off-shore trade and the trade in which the SS RIVIERA was engaged and thus would not have identical interests in the subject matter of this suit.

> MacRae case Finding of Fact No. III (Tr. 332); Conclusion of Law No. II (Tr. 332).
> Morrison case Finding of Fact No. III (Tr. 370); Conclusion of Law No. II (Tr. 379).

10. The court erred in making Conclusion of Law No. V (Tr. 245) wherein it was held that the appellee was entitled to judgment not only against the individual members of the Sailors' Union of the Pacific who were served, but also against each member of the Sailors' Union of the Pacific and the Sailors' Union of the Pacific as an entity, and wherein the court held that execution should issue against not only the property of the individuals served, but also against the property of the Sailors' Union of the Pacific, and in holding that the judgment was res adjudicata as to the issues litigated with reference to individual members of the Sailors' Union of the Pacific not served in this suit, for the reason that the appellee is not entitled to have judgment or decree entered in its favor against the appellants, or any of them, for any sum, because the conduct of the appellants in picketing was not wrongful, but on the contrary said conduct was a protected concerted activity

within the meaning of the Labor Management Relations Act, and said picketing was not for an unlawful purpose; and further that if any judgment were to be entered, it should be only against the individuals personally served with process, and should not run against the class consisting of members of the Sailors' Union of the Pacific and the Sailors' Union of the Pacific for the reason that this is not a true class suit, and further that a judgment under the laws of Oregon which the District Court is bound to follow in this case cannot be entered against a voluntary unincorporated association.

MacRae case Conclusion of Law VI (Tr. 333).
Morrison case Conclusion of Law V (Tr. 380).

11. The court erred in entering judgment in favor of appellee (Tr. 246) and in failing to enter judgment in favor of the appellants on the ground and for the reason that the appellee has neither plead nor proven a cause of action against the appellants in that the conduct complained of by the appellee is conduct which is protected under the applicable federal law and is not conduct for an unlawful purpose under either state or federal law.

MacRae case Decree (Tr. 335).
Morrison case Decree (Tr. 381).

12. With respect to the MacRae case only, the court erred in making Conclusion of Law No. IV (Tr. 333) wherein the court concluded that "even though" the picketing was for the purpose of requiring the replacement of the licensed personnel with members of the union, such picketing would not create a labor dispute and would be illegal under both state and federal law,

on the ground and for the reason that the picketing for said purpose constitutes a labor dispute and is within the type of conduct protected under the federal and state law.

SUMMARY OF ARGUMENT

This case came before the District Court as a suit for an injunction and for damages, the District Court's jurisdiction being based upon diversity of citizenship and the amount involved. The District Court awarded damages for conduct consisting only of peaceful picketing, on the ground that the object of the picketing was "an unlawful purpose", and therefore wrongful.

It is the contention of the appellants that since the picketing involved an ocean-going vessel engaged in "commerce", that the matters and things complained of by the appellee are governed by the terms of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. It is further contended by appellants that the Act has preempted the field of regulation or restraint of picketing, and has established an exclusive body of rules with respect to picketing. And finally, that under the Act the right to carry on the conduct involved herein was guaranteed and was not specifically prohibited.

The appellants submit, therefore, that since under the federal law the picketing by them was legal, the court below erred in awarding damages on account of the picketing.

In the alternative, appellants also contend that should it be found that the picketing complained of was not a matter governed by the federal law but governed by the state law, nevertheless the picketing was pursuant to a "labor dispute" and said picketing was a valid exercise of the right of free speech, and not conducted for "an unlawful purpose", and therefore the damages, if any, that the appellee sustained on account of the picketing were damnum absque injuria.

Also, in the alternative, the appellants contend that if it should be found that the picketing by the appellants was in violation of the federal law, being an "unfair labor practice" as defined under the Act, that nevertheless the appellee cannot recover therefor in this action for the reason that the appellee has not pursued the remedy prescribed under the Act, which remedy is exclusive.

The appellants contend that the damages, if any, sustained by the appellee due to the idleness of its vessel were not proximately caused by the picketing, but by independent intervening acts of both the appellee itself and of third parties. Finally it is the contention of appellants that in this suit if judgment is to be entered it should run only to the individual defendants served and not against the union or against its property, for the reason that the District Court in hearing a diversity case must follow the law of the State of Oregon and that under the law of that state a judgment for damages is not allowable against a voluntary unincorporated association.

ARGUMENT

I

THE PICKETING WAS NOT WRONGFUL CONDUCT

The appellee's vessel, the SS RIVIERA, arrived at Portland, Oregon, on September 3, 1952, and on September 9, 1952, practically all of its crew members went on strike and were discharged. From September 9, until October 14, 1952, it is admitted that the picketing of the vessel was by persons other than the appellants (Tr. 18).

It also is not claimed in this case that appellants induced the crew members to go on strike and terminate their articles. The record shows that in another suit known as Civil No. 6661 the appellee sued the Sailors' Union of the Pacific in the District Court of Oregon, contending that it had induced the members of the crew to violate their articles (Tr. 445). The court concluded, however, that the Union did not wrongfully induce the members of the crew to breach their articles and to strike (Tr. 454) and a decree was entered dismissing the suit (Tr. 455).

The present suits seek damages for the period beginning October 14, 1952. The District Court found that the unions and their members have an economic interest in the working conditions and wages of seamen employed aboard vessels engaged in the grain charter trade between the ports of the United States and the

Orient (Tr. 243) and further found that the average wages for the SS RIVIERA crew members amounted to only about one-third of the amount of wages paid seamen represented by the unions while employed aboard United States flag vessels engaged in the same trade between ports of the United States and the Orient (Tr. 243).

It was admitted that the appellee's vessel had carried one cargo of American grain to the Orient and was preparing to carry another (Tr. 16). It was also admitted that during the picketing complained of in this case there were approximately 25 jobs open for seamen on the SS RIVIERA (Tr. 21).

It was also admitted that all of the picketing was conducted in a peaceful manner (Tr. 18).

The court held that the picketing was wrongful because it had for its object the "unlawful purpose" of inducing the appellee to rehire its former members whom the District Court said "had deserted". In order to properly determine the question of whether or not the picketing by the appellants was wrongful, it must first be determined whether the substantive law to be applied shall be state or federal law. Historically the body of the substantive law governing the right to picket developed by state court decisions. In other words, the law that was applied to regulate picketing was the law of the state where the picketing occurred.

The first effective statute governing picketing was the Norris-LaGuardia Act passed in 1932 (47 Stat. 70

et seq., 29 USCA Sec. 101 et seq.). Similar acts were passed in many states, including Oregon (Sec. 102-902 OCLA). These acts deprived the courts of jurisdiction to enter an injunction against picketing in cases "involving and growing out of labor disputes." The body of the case law which developed after the passage of these acts, both in the state and federal courts, centered around the question of whether or not there existed a "labor dispute" within the meaning of the Act.

At the same time another approach was made in order to sustain the right to picket. Remembering that the right to picket was being determined by the substantive law of the state where the picketing occurred, it was contended that the restraint by the state court of picketing was a violation of the federal constitutional right of free speech. The Supreme Court of the United States in a number of cases protected picketing as an exercise of the right of free speech.

> *Senn v. Tile Layers Protective Union* (1937), 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229.
>
> *Thornhill v. Alabama* (1940), 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093.
>
> *Carlson v. California* (1940), 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104.
>
> *American Federation of Labor v. Swing* (1941), 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855.
>
> *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl* (1942), 315 U.S. 769, 62 S. Ct. 118, 86 L. Ed. 1178.
>
> *Cafeteria Employees Union Local 302 v. Angelos* (1943), Also called: *Angelos v. Mesevich,* 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

In the meantime in order to restrict the right of picketing established both under the Norris-LaGuardia Act and under the free speech doctrine, there was developed the "unlawful purpose doctrine." In other words, it was held in a line of cases that the anti-injunction statute would not bar an injunction against picketing if the objective sought by the picketing was regarded as unlawful.

> *Peters et al. v. Central Labor Council,* 179 Or. 1, 9, 169 P. 2d 870 (1946).

Also it was held that the guarantee of the right of free speech by picketing would not be sustained where the object of the picketing was unlawful.

> *Carpenters and Joiners Union v. Ritter's Cafe,* 315 U.S. 722, 62 S. Ct. 807 (1942).
> *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 69 S. Ct. 684 (1949).
> *Hughes v. Superior Court of California,* 339 U.S. 460, 70 S. Ct. 718 (1950).

The cases that developed concerning picketing were practically all resolved around questions of the existence of a labor dispute, of free speech and lawfulness of purpose of the picketing.

The passage of the Wagner Act (49 Stat. 449, 29 U.S.C.A. Sec. 151 et seq.) in 1935 effected no change upon the existing body of state law because the Wagner Act was limited to employer unfair labor practices. It was not until the passage in 1947 of the Taft-Hartley Amendment (61 Stat. 136, 29 U.S.C.A. Sec. 141 et seq.) that a change was to be made. Until that time it was clear that the state law regulating picketing was applia-

ble to all businesses, whether or not they were engaged in interstate commerce. The passage of the Taft-Hartley Amendments created for the first time federal legislation which laid down substantive rules concerning picketing. Section 7 of the Act (61 Stat. 140, 29 U.S.C.A. Sec. 157) provided as follows:

> "Employees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." (Set out in full in Appendix D.)

Section 8 of the Act (61 Stat. 140, 29 U.S.C.A. Sec. 158) defined for the first time labor organization unfair labor practices (Appendix E).

Following this legislation the Supreme Court has held in a line of cases (See Appendix A) that by the passage of the Taft-Hartley Amendments Congress thereby pre-empted the field of regulation of picketing and similar conduct, and that thereby the laws of the states, both statutory and court made, were superseded. This principle was made abundantly clear by the following language in *Garner v. Teamsters Union* (1953), 346 U.S. 485, 499, 74 S. Ct. 161, 170; 98 L. Ed. 228:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to

> be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."

This language was recently approved in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 484, 99 L. Ed. 386 (1955). In the Weber case the court briefly summarized its earlier holdings on pre-emption.

Coming back again to the facts in this case, it is abundantly clear that the picketing involved commerce, and that therefore the provisions laid down in the Act of 1947 shall govern. It follows that the state law no longer applies, Congress having pre-empted the field. This being so, the legality of the picketing must be determined by the provisions of the federal statute, and not by any test of "unlawful purpose" as laid down in the state decisions.

Section 7 of the Act (Appendix D) provides that employees shall have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The admitted facts in the case at bar, as well as the findings of the court, makes it clear that the picketing by the appellants was in aid of collective bargaining, and was therefore conduct protected by the Act. *International Union v. O'Brien,* 339 U.S. 454, 70 S. Ct. 781 (1950).

The appellee has never contended that the picketing constituted an "unfair labor practice" within the meaning of Section 8 of the Taft-Hartley Act. The appellee has always merely contended that the picketing was for

an "unlawful purpose." Indeed, the appellee could not have contended that the conduct of the appellants in picketing constituted an unfair labor practice and at the same time have sought as it did in this case an injunction in the District Court and damages. This is so because had the picketing constituted an unfair labor practice, the appellee's sole remedy would have been found under the Act by an application to the National Labor Relations Board for a cease and desist order, and the District Court would not have had jurisdiction. *Garner v. Teamsters Union etc., supra.*

The few cases where the Supreme Court has held that action by a state court was not contrary to Section 7 of the Act, have all involved situations where the state law condemned the conduct because the *means* as distinguished from the *objective* were improper. See for example *Allen-Bradley Local etc. v. Wisconsin Employment Relations Board* (1942), 315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154, (violence by strikers); *National Labor Relations Board v. Fansteel Metallurgical Corporation* (1939), 306 U.S. 240, 59 S. Ct. 490, 83 L. Ed. 627, (a sit-down strike), and *International Union v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 69 S. Ct. 516 (quicky strikes).

The Supreme Court allowed the state under its police power to regulate conduct not necessarily connected with conserted labor activity which violated local law.

This naturally follows because of the necessity of the federal Act providing a uniform policy to govern labor disputes affecting commerce. In other words, the Court

has held that the labor policy which governs the *objective* of strikes shall be determined by the federal Act, whereas if the *means* of carrying out the objective consists of unusual conduct, it might be goverened by the state under its own police power. *Allen-Barkley Local etc. v. Wisconsin Employment Relations Board, supra.*

This point is made clear by the following passage from *Cox, Federalism in Labor Law,* 67 Harvard Law Review 1297, 1327 (1954):

> Whatever the proper answer in these doubtful cases, a state ought not to be free to restrict concerted action by employees subject to federal law merely by branding their objective 'unlawful'. The slippery phrase 'unlawful objective' has long confused labor law by obscuring a fundamental distinction. The term covers not only (1) the purpose to induce an employer to engage in unlawful conduct but also (2) bargaining demands which an employer may grant without violating any statute or percept of public policy but which the court regards as beyond the required scope of bargaining or insufficient to justify the injury to the employer's business. Judicial opposition to concerted action in the second category is not based upon employees' goal, therefore, but upon concert of action against the employer as a method of achieving it. Such a rule of decision or an equivalent statute permits the same substantive conditions to be established by other means. The purpose of NLRA Section 7 was to immunize employees against this doctrine."

In the case at bar it was admitted, and the court found, that the picketing was peacful. The means were not in any way contrary to state law. The objective of the picketing in the case at bar was well within the guarantee of the federal Act and not prohibited by it.

Appellants therefore submit that since their concerted activities were conducted by lawful and peaceful means, and for objectives protected under the federal Act, they were therefore privileged and not wrongful. It follows, therefore, that appellants should not be liable for damages for carrying on this conduct.

II

PICKETING FOR "UNLAWFUL PURPOSE"

Although we firmly believe that the instant case should be governed by the federal law, we will in this portion of our brief, point out that should the question of the picketing be held to be governed by local state law, that nevertheless the picketing by the appellants does not fall within the "unlawful purpose doctrine."

It can hardly be denied that since the appellants have an economic interest in the craft, trade and occupation involved in this case, and since there were jobs open aboard the vessel, and since there were admittedly problems of representation and of fixing terms and conditions of employment, that this is a case involving and growing out of a "labor dispute" within the meaning of the Norris-LaGuardia Act. See 47 Stat. 70 et seq., 29 U.S.C.A. Sec. 113 set out in Appendix B, and the Labor Management Relations Act. See Appendix F.

As pointed out above in order to outlaw picketing which would otherwise be an exercise of free speech, or be considered pursuant to a "labor dispute", there has developed in many courts the doctrine that if the picket-

ing is for an "unlawful purpose" that it is wrongful. However, it is interesting to note, as pointed out by the author of the annotation in 29 A.L.R. 2d at 360, that in the federal courts it has been held that under the Norris-LaGuardia Act the objective of the union is immaterial if the statute is otherwise applicable. The annotation states:

> "It was believed that the Norris-LaGuardia Act and similar state laws has eliminated judicial discreation in applying the unlawful purpose doctrine where the union's activities were reasonably related to working conditions, as defined in the statutes, but some of the state courts have been extremely reluctant to give up their right to apply this test.
>
> * * *
>
> "In New Negro Alliance v. Sanitary Grocery Co. (1938) 303 U.S. 552, 82 L. Ed. 1012, 58 S. Ct. 703, rev. 67 App. DC 359, 92 F. 2d 510, upholding the right of a Negro group to picket stores allegedly discriminating against their race, the court said: 'The Act does not concern itself with the background or the motives of the dispute.' "

Other federal cases following the principle set forth in the *New Negro Alliance* case are as follows:

Matson Navigation Co. v. SIU (1951 DC Md.), 100 F. Supp. 730.

Wilson & Co. v. Birl (1939 CA 3), 105 F. 2d 948.

Diamond Full-Fashioned Hoisery Co. v. Leader, (DC Pa. 1937) 20 F. Supp. 467.

The courts applying the unlawful purpose doctrine have recognized that in order for picketing to be declared wrongful in that it is for an unlawful purpose, it must have for its object the requiring of *the employer* to do that which would be a crime or a violation of the law.

This requirement was pointed up clearly in two cases decided on the same day by the Oregon Supreme Court. In the first, *Markham & Callow v. International Woodworkers,* 170 Or. 517, 135 P. 2d 727 (1943), it was held that after another union had been duly certified as collective bargaining agent by the NLRB, picketing for the purpose of inducing the employer to violate the new new collective bargaining agreement was picketing for an unlawful purpose. In the other case, *Stone Logging Co. v. International Woodworkers,* 171 Or. 13, 21; 135 P. 2d 759 (1943), it was held that picketing under practically the same situation but where there was no certification, was not picketing for an unlawful purpose. In so holding the court said:

> "The chief distinction lies in the fact that in the Markham & Callow case the union acting as exclusive bargaining agency for all of the employees and which as such secured the union shop contract had been certifed as the exclusive representative of all of the employees for the purpose of collective bargaining by the National Labor Relations Board pursuant to an election conducted by that board. In the case at bar, on the other hand, the plaintiff comes before the court without the benefit of any certification."

A comparision of these Oregon cases makes it clear that the rule that picketing for "an unlawful purpose" refers to the object of the picketing in inducing an employer to do something which he cannot legally do. In the *Markham & Callow* case, the court declared the picketing to be for an "unlawful purpose" in that it had for its object the inducement of the employer to violate the National Labor Relations Act, whereas in the *Stone Log-*

ging Company case the employer would not have been in violation of the National Labor Relations Act by dealing with the picketing union, when there had been no certification.

In *State v. Dobson,* 195 Or. 533, 245 P. 2d 903 (1952), the court held that the picketing was for an unlawful purpose because it had for its object the inducement of the employer, Tidewater, to enter into a contract with the picketing union at a time when a certification election was pending, and when such conduct on the part of the employer would be unlawful under the Taft-Hartley law.

Also, in *Schwab v. Motion Picture Operators,* 165 Or. 602, 109 P. 2d 600 (1941), the Oregon Supreme Court held that the picketing by the union was for an unlawful purpose in that picketing was not only for a closed shop but also for a closed union, and that it would be unlawful for the employer to enter into such a monopolistic contract. The court said:

> "The only substantial controversy between the parties grows out of the union's demand that the plaintiff join it in its monopolistic aim."

The same distinction has been made by the Supreme Court of the United States, where the cases have made it clear that unlawful purpose refers to the inducement of the employer to do that which is unlawful.

In *Building Service Employees International v. Gazzam,* 339 U.S. 532, 70 S. Ct. 784 (1950), the union picketed an employer who refused to sign a union shop contract with the union. There was a state statute that

an employee should be free from coercion by an employer, not only in his desire to join a union, but also in his freedom to "decline to associate with his fellows." The Washington court enjoined the picketing on the ground that it was to force the employer to violate that state statute. The Supreme Court affirmed the lower court. The *Gazzam* case made it very clear that the illegal object ran to the employer and not to the employee. The court held that it would not have been illegal to picket to induce the employees to join the union, but it would have been illegal to picket to induce the employer to force the employees to join the union.

Other cases to the same effect are:

Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807 (1942). (Inducing of employer to violate state anti-trust law).

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684 (1949). (Inducing the employer to violate the state restraint of trade law).

Hughes v. Superior Court of California, 339, U.S. 460, 70 S. Ct. 718 (1950). (Inducing the employer to violate the state anti-discrimination law).

The principle that the unlawful purpose rule applies only where the object of the picketing requires the employer to do that which it cannot legally do, is clearly enunciated A.L.I. Restatement of Torts, Sections 775, 777 and 794, set out in Appendix C.

We conclude, therefore, that since the employer in this case could have rehired its former crew members,

without violating any law, that even if it were assumed that the sole object of the picketing was to require the rehiring of the crew members, such would not be an "unlawful purpose" within the meaning of the law.

The court below, therefore, should have found that the picketing involved was pursuant to a labor dispute and a valid exercise of the appellants' right of free speech, and that damages, if any, as a result of the picketing were damnum absque injuria. *Starr v. Laundry Union,* 155 Or. 634, 63 P. 2d 1104 (1937); *Wallace v. International Association,* 155 Or. 652, 63 P. 2d 1090 (1937); *Peters v. Central Labor Council,* 179 Or. 1, 169 P. 2d 870 (1946); *Baker Hotel v. Employees Local,* 187 Or. 58, 207 P. 2d 1129 (1949).

Further the District Court should have dismissed appellee's suit which was brought in equity, since its ground for equitable relief has wholly failed, and the court should not have retained the case for damages. *Cumberland Building and Loan Asso. v. Sparks,* (C.C. E.D. Ark. 1900) 106 Fed. 101; 19 Am. Jur., Equity, Sec. 132, p. 132.

III

DAMAGES WERE NOT PROXIMATELY CAUSED BY THE PICKETING

The judgment in this case for damages is based upon the court's conclusion that the "defendants' said picketing was the sole proximate cause of plaintiff's said damages" (Tr. 245). This conclusion was obviously based

on its finding of fact that the employees of stevedoring, ship repair firms and others ordered to work on the SS RIVIERA refused to so work when the pickets were present and the fact that after the picket line was removed the employees of the contractors continued their work (Finding of Fact XVIII, Tr. 242).

It is the contention of appellants that the failure of the employees of the independent contractors to cross the picket line was an independent intervening cause of appellee's damages. Appellants also contend that the custody of the vessel by the U. S. Marshal pursuant to a libel during the period of the picketing was also an independent intervening cause of appellee's damages, and thirdly, appellants contend that the fact that the shipowner did not have a crew aboard its vessel was also an independent cause of appellee's damages.

The general rule with respect to liability where there has been independent intervening cause is stated in 25 C.J.S., Damages, p. 476 as follows:

> "*Act of third person.* Where there has intervened between defendant's act and the injury an independent illegal act of a third person producing the injury, and without which it would not have happened, the latter is held the proximate cause of the loss and defendant is excused; or, as the principle has been expressed, although there may have been an original wrongful act, if it produced injury only through the intervening independent and wrongful acts of others, the author of the former is not liable in damages.
>
> "On the other hand, defendant may be liable where damage results from the intervention of legal

> and innocent acts of third persons, naturally and probably following from his wrongful act."

The acts of the longshoremen and repairmen in refusing to cross the picket line were "intervening independent and *wrongful* acts of others" which relieved the appellants from responsibility for damages sustained by the appellee on account of the idleness of its vessel. The stevedoring and repair companies had the duty under their contracts to work on the vessel, and their "employees ordered to work on the said SS RIVIERA refused to work while said pickets representing the Sailors' Union of the Pacific were present" (Tr. 242). The conduct on the part of the employees was wrongful. A person's duty to perform his work or perform a contract is not suspended by the necessity of crossing a picket line. Judge James Alger Fee in a decision in *Montgomery Ward & Co. v. Northern Pacific Terminal et al*, 32 LRRM 2386, 2411 (1953), in holding various rail and truck operators liable for refusing to transport and deliver goods to Montgomery Ward while there was a picket line at Ward's, said:

> "It is said, one of the principles binding upon all members of the laboring class is that none shall cross a picket line. Such a theory is far too broad and is not even observed by the most idealistic union men themselves. (Citing NLRB v. Rockaway News Supply Co., 197 F. 2d 111). * * *
>
> "The ritualistic recognition of a 'picket line' under all circumstances by common carriers because of union pressure lays the foundation for a general strike and class war. If the court appraises correct-

> ly the public interest and the feeling of the great majority of union men themselves, these developments would not be in accord with our history and would destroy the gain which labor has made. Yet in this very situation were all of the elements necessary to provoke illegally a general strike, which this country, for all its liberality toward labor, has voided as anarchy. The insistence upon the paramount obligation of an employee to some distant union, irrespective of law or morality, is the basis of the Marxian conflict of classes. It has no place in the American way of life."

Moreover, it has been held in at least two cases that an employee did not have a legal right to refuse to cross a picket line, and that the action of his employer in discharging him for refusing to cross the picket line did not constitute an unfair labor practice. *NLRB v. Rockaway News Supply Co.* (CA-2 1952), 197 F. 2d 111, 30 LRRM 2119; *NLRB v. Illinois Bell Telephone Co.* (CA-7 1951), 189 F. 2d 124, 28 LRRM 2097, cert. den. 344 U.S. 885.

The foregoing makes it clear that the conduct of shore employees in refusing to work aboard the vessel was wrongful conduct. Their employers had the legal right to discharge them and to hire others to fulfill their contractual obligations.

The appellee was awarded damages for "loss of earnings and expense of maintaining the SS RIVIERA" during the period of the picketing (Tr. 244). However, during the period of the picketing the vessel was in the custody of the United States Marshal pursuant to a libel filed in the District Court of Oregon (Tr. 19). The ves-

sel was not freed until the payment of the decree under that libel on December 11, 1952 (Tr. 20-Tr. 442).

The rule is well settled that a vessel which is arrested by the Marshal becomes *custodia legis*. In Vol. 4, *Benedict on Admiralty,* 6th Ed., Sec. 622, p. 285, the rule is stated that where a vessel is seized and held under process that the voyage is broken up and the crew is automatically discharged, and there is no further lien for wages or other services to the vessel. See also *Old Point Fish Co. v. Haywood,* (CCA-4 1940) 109 F. 2d 703; *New York Dock Co. v. THE POZNAN* (1927), 274 U.S. 117, 47 S. Ct. 482. We submit, therefore, that the appellee could not have been damaged during the period of the picketing because it did not have the custody of the vessel, for the idleness of which it is claiming damages.

Furthermore, for more than a month prior to the picketing complained of in this case, and at all times during the picketing, the appellee did not have a crew aboard the vessel (Agreed Facts XX, Tr. 21).

Where a party seeks damages for loss of profits or loss of use of its property, it must have been in a position to do business or to use its property and would have been able to have done so but for the acts of the parties causing the loss of the use of the property, 17 C. J., Damages, p. 767, Sec. 96; 15 Am. Jur., Damages, Sec. 40, p. 439.

The appellants submit, therefore, that even if it is assumed that their conduct was wrongful, nevertheless it was not the proximate cause of appellee's damages on account of the idleness of its vessel. The intervening re-

fusal of the shore employees to cross the picket line, together with the appellee's own failure to have a crew aboard the vessel and to redeem it from the custody of the Marshal, were all independent intervening causes of the damages from the idleness of the vessel.

IV

THE CLASS SUIT AND FORM OF DECREE

These suits have not been brought by the appellee against any of the unions as an entity. Federal Rule of Civil Procedure 17 (b) provides that the "capacity to sue or be sued shall be determined by the law of the state in which the District Court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States * * * ". The Notes of the Advisory Committee on Rules with reference to Rule 17 (b) state as follows:

> "This rule follows the existing law as to such associations, as declared in the case last cited above." (United Mine Workers of America v. Coronado Coal Co. (1922) 42 S. Ct. 570, 259 U.S. 344, 66 L. Ed. 975, 27 ALR 762).

The *Coronado Coal Company* case recognized that at common law an unincorporated association could not sue or be sued in its own name, and could only be sued in the name of its members, "and their liability had to be enforced against each member." The same common

law rule applies in the State of Oregon. *Cousins v. Taylor,* 115 Or. 472, 239 Pac. 96 (1925).

Appellee undoubtedly recognizing the foregoing principles, brought the instant cases as a class suits pursuant to Federal Rule of Civil Procedure 23 (a) (1) which allows actions to be brought by representation where the parties are numerous and where one or more of the parties adequately represents the group, and "where the character of the right sought to be enforced for or against the class is joint or common." Service was made upon the agents of the unions in Portland. The court held the service to be sufficient and allowed judgment not only against the particular persons served but also against each member of the union, and further ordered that execution may issue against not only the property of the individuals served but against any property held by the union or for the use and benefit of the union, "whether held in the name of the association or others for the association" (Tr. 246, 335, 381).

The adoption of Rule 23, like the adoption of Rule 17 (b), was not intended to change the substantive law, but merely to afford a procedural device to allow to some extent actions against associations by means of a class suit.

In Vol. 3, *Moore's Federal Practice,* Sec. 23:11, p. 3456, entitled "Effect of Judgments," it is pointed out that it was proposed to the Advisory Committee that it should include in Rule 23 the effect of a judgment in a class suit. The Committee answered this proposal in its Notes as follows:

> "The Committee considers it beyond their functions to deal with the question of the effect of judgments on persons who are not parties."

Moore commented that "This was due to the feeling that such matter was one of substance and not one of procedure." The same proposition is stated as follows in the concurring opinion of Justice Johnson in *Montgomery Ward & Co. v. Langer,* 168 F. 2d 182 (CCA-8 1948), as follows:

> "Except as to the 72 individuals upon whom service of the summons was made, judgment is sought against each of the other union members on the basis of class representation.
>
> "Whether as a matter of due process such representation could legally be made to constitute the basis for a personal judgment, if authorizing legislation existed, I shall not pause to consider.
>
> "It is sufficient here that no jurisdiction over the person for the purpose of entering such a judgment has heretofore been recognized as existing on the basis of mere class representation. And, of course, Rule 23 (a) is not intended to change previous jurisdictional concepts (see rule 82) but only to enable the procedural device of a class action to be used as well at law as in equity, for any purpose which it can legitimately be made to serve.
>
> "Such an adjudication could probably also be made to serve as a foreclosure of all questions against the members of the union as a group, leaving open only the question in favor of each individual, who might subsequently be sued, and served with summons as a basis for a personal judgment, whether he had participated in, authorized or ratified such wrongful acts as the union was found to have committed."

The concluding paragraph of Justice Johnson's concurring opinion expresses the limit to which a judgment can go in a class suit against members of an unincorporated association. In other words, the judgment is binding only against those defendants who are actually served and not binding against the other members of the class, except insofar as the judgment may be res adjudicata on some of the issues. However, in order to make the judgment binding upon the other members of the class a separate suit must be brought in which it must be shown that the individual had participated in, authorized or ratified the wrongful acts.

The judgments herein, however, have been made binding against the property of the unincorporated unions. It is appellants' contention that since under the substantive law of the State of Oregon a judgment could not be rendered against the union, that therefore under the ruling of *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S. Ct. 819 (1938), a judgment could not be rendered against the unions' property in the Federal Court merely based upon the Federal Rules of Civil Procedure.

APPENDIX A

Pre-Emption Cases Decided in the Supreme Court:

Plankinton v. W.E.R.B., 338 U.S. 953, 70 S. Ct. 491 (1950).

Bethlehem Steel v. N.Y.S.L.R.B., 330 U.S. 767, 67 S. Ct. 1026 (1947).

LaCross Telephone Corp. v. W.E.R.B., 336 U.S. 18, 69 S. Ct. 379 (1949).

International Union v. O'Brien, 339 U.S. 454, 70 S. Ct. 781 (1950).

Amalgamated Asso. v. W.E.R.B., 340 U.S. 383, 71 S. Ct. 359 (1951).

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025.

APPENDIX B

Title 29 U.S.C.A. Section 113. Definitions of Terms and Words Used in Chapter.

When used in sections 101-115 of this title, and for the purposes of such section—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX C

A. L. I. Restatement of Torts.

Section 775 of the Restatement of Torts provides as follows:

"Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

In comment (a) under Section 775, the following is said:

"The legality of the concerted action depends upon the nature of the conduct and of the object to which the conduct is directed."

In the case at bar it is admitted that the conduct of the plaintiff in picketing the vessel was at all times peaceful. The Restatement defines the "object" of concerted action in Section 777 as follows:

"In this chapter, an 'object' of concerted action by works against an employer is an act required in good faith by them of the employer as the condition of their voluntarily ceasing their concerted action against him."

In Section 794, Restatement of Torts entitled "Object Prohibited by Law" it is stated:

"An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

APPENDIX D

Title 29 U.S.C.A. Section 157.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

APPENDIX E

Title 29 U.S.C.A. Section 158 (b).

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

"(4) to engage in, or to induce or encourage the employees of any mployer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle

or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work; Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of

such employees whom such employer is required to recognize under this subchapter;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affect; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

APPENDIX F

Title 29 U.S.C.A. Sec. 152—Definitions—

"When used in this chapter— * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MACRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLEE'S BRIEF

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

K. C. TANNER and
RICHARD R. CARNEY,
1041 Pacific Bldg., Portland 4, Oregon,
Attorneys for Appellants.

WOOD, MATTHIESSEN, WOOD & TATUM,
JOHN D. MOSSER,
1310 Yeon Bldg., Portland 4, Oregon,

GUNTHER F. KRAUSE,
916 Portland Trust Bldg., Portland 4, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-55

FILED

JUL 13 1955

PAUL P. O'BRIEN, CLERK

INDEX

Page

Jurisdictional Statement ... 1

Statement of the Case ... 2

Questions Presented ... 4

Statement of Facts ... 5

Background ... 5

No. 14663—The Sailors' Union of the Pacific ... 9

No. 14664—Local 90, National Organization of Masters, Mates and Pilots A. F. of L. ... 13

No. 14665—Atlantic and Gulf District S.I.U., A. F. of L. ... 16

Summary of Appellee's Argument ... 18

Argument:

The Purpose of the Picketing—Answer to Appellants' Specifications of Error 1 and 2 (Br. 5, 6) ... 21

The Purpose of the Picketing Was Unlawful—Answer to Appellants' Specifications of Error 7, 11 and 12 (Br. 9, 12-13) and Argument (Br. 15-28) ... 23

The Taft-Hartley Act Is Inapplicable to These Cases—Answer to Appellants' Specification of Error 6 (Br. 9) and Argument (Br. 19-23) ... 29

The Validity of the Prior Injunctions Under the Norris-LaGuardia Act and the Equity Jurisdiction of the Court Below Have no Relevance to the Judgments Now Before the Court—Answer to Appellants' Specification of Error 6 (Br. 9) and Argument (Br. 23-28) ... 30

INDEX (Cont.)

Page

The Picketing Was the Proximate Cause of Appellee's Damage—Answer to Appellants' Specifications of Error 3, 5, and 8 (Br. 7, 8, 10) and Argument (Br. 28-33) 33

The District Court Correctly Entered Judgment Against Appellant Unions and Their Members and Provided for Execution Against Property Held by the Unions—Answer to Appellants' Specification of Error 9 and 10 (Br. 10-12) and Argument (Br. 33-36) 37

Conclusion 43

INDEX OF AUTHORITIES

Table of Cases

Page

Benz et al. v. Compania Naviera Hidalgo, 205 F. 2d 944 (Ca-9, 1953) 2

Brotherhood of Locomotive Enginemen v. Tunstall, 163 F. 2d 289 (CCA 4, 1947) 40

Cousins v. Taylor, 115 Ore. 472, 239 Pac. 96 (1925) 38

International Brotherhood v. Hanke, 339 U.S. 470, 94 L. Ed. 995, 70 S. Ct. 773 26

Ketcher et al. v. Sheetmetal Workers International Association et al., 115 F. Supp. 802 (1953, E.D. Ark. W.D.) 40, 41

Lonsford, et al. v. Burton, et al. (1953), 202 Ore. 497, ... P. 2d 38

Montgomery Ward and Co. Inc. v. Langer et al., 168 F. 2d 182 (1948 C.C.A. 8) 40

Montgomery Ward and Company, Inc. v. Northern Pacific Terminal Company et al., 32 L.R.R.M. 2386 (D. Ore. 1953) 35

NLRB v. Illinois Bell Telephone Co. (CA-7 1951), 189 F. 2d 124, cert. den. 342 U.S. 885, 96 L. Ed. 663, 72 S. Ct. 173 36

NLRB v. Rockaway News Supply Co. (CA-2 1952), 197 F. 2d 111, aff'd 345 U.S. 71, 97 L. Ed. 832, 73 S. Ct. 519 36

Pascale et al. v. Emery et al., 95 F. Supp. 147 (1951, D. Mass.) 40

Peninsular & Occidental Steamship Co. v. N.L.R.B., 98 F. 2d 411 .... 24, 26, 28

Rees v. U. S., 95 F. 2d 784 .... 24, 26, 28

St. Germaine et ux. v. The Bakery and Confectionary Union No. 9 of Seattle et al. (1917), 97 Wash. 282, 166 Pac. 665 38

Page

Sailors Union of the Pacific, Case No. 20, R.C. 809, May 1, 1950, C.C.H. Labor Reports, 1950-51, NLRB Decisions, Par. 1,081 ... 30

Schwab v. Moving Picture Machine Operators, Local No. 159, 165 Ore. 602, 109 P. 2d 600 ... 26

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 86 L. Ed. 1246, 62 S. Ct. 886 ... 24, 26, 28

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen et al., 148 F. 2d 403 (1945, C.C.A. 4) ... 39

United Mine Workers of America v. Coronado Coal Co. (1922), 259 U.S. 255, 66 L. Ed. 975, 42 S. Ct. 570, 27 A.L.R. 762 ... 37, 42

U. S. v. United Mine Workers of America, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 ... 31

FEDERAL STATUTES

28 U.S.C.A. §1252 ... 1
28 U.S.C.A. §1291 ... 1
28 U.S.C.A. §1332 ... 1
29 U.S.C.A. §102 (Norris-LaGuardia Act) ... 31

OREGON STATUTE

ORS §13.170, formerly O.C.L.A. §9-106 ... 38

TEXTS

2 A.L.R. 2d 1278 ... 27

30 Am. Jur., "Judgments", §248, p. 977 ... 22

2 Benedict on Admiralty, 6th Ed., §298, p. 382 ... 34

3 Moore, Federal Practice, 2d Ed., §23.11, p. 3465 ... 40
5 Moore, Federal Practice, 2d Ed., §38.17, p. 163 ... 32

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MACRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLEE'S BRIEF

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon 28 USCA §1291, these consolidated appeals being from three final judgments of the District Court of the District of Ore-

gon, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A. §1252.

The jurisdiction of the Court below was based upon 28 USCA §1332, sub-paragraph (a) (2). It was stipulated in each of the pretrial orders that diversity of citizenship and an amount in excess of $3,000.00 exclusive of interest and costs were involved. The agreed facts there set forth show that the plaintiff, appellee here, was and is a corporation organized and existing under and by virtue of the laws of the Republic of Panama, and that the individually named defendants, appellants here, were citizens of various of the United States, mainly Oregon, and each a citizen and inhabitant of a State or country different from that of appellee (Tr. 14, 300, 346).

STATEMENT OF THE CASE

These are consolidated appeals from three judgments of the United States District Court for the District of Oregon, each of which awarded appellee (plaintiff) damages for the period during which it was deprived of the use of its vessel, the SS RIVIERA, because of picketing, first by appellants in No. 14663 from October 14, 1952, until enjoined by that court on November 26, 1952; next by appellants in No. 14664 from November 28, 1952, until enjoined by the District Court on December 8, 1952; and finally, by appellants in No. 14665 from December 10, 1952, until enjoined by the District Court on December 12, 1952.

Appellants previously appealed from the injunctions, *Benz et al. v. Compania Naviera Hidalgo,* 205 F. 2d

944. There this Court held that Appellee's claim for damages was "one which it has the right to prosecute in the court below wholly apart from any claim for an injunction." Finding the issues raised by the injunctions moot, the Court remanded with the admonition that "issues relating to the claim of damages . . . be tried by the parties as free from the effects of such injunctions, as if the the same had not been issued."

Upon receipt of the mandate in the District Court, the issues were made up by Pre-trial Orders containing certain agreed facts, the contentions of the parties and a statement of the issues thus framed (Tr. 13, No. 14663; Tr. 299, No. 14664; Tr. 345, No. 14665). The parties stipulated that the cases might be tried together, and that transcripts of the testimony and exhibits received at the time of the hearing prior to issuance of the injunction in each of the cases and also evidence received in two prior cases involving the SS RIVIERA might be offered with the same effect as if the evidence were presented anew. The trial was had before the Honorable Gus J. Solomon, who had heard all of the previous litigation concerning this vessel. After admission of evidence offered from the previous proceeding and some additional evidence relating to damages, the matter was taken under advisement. Subsequently the court rendered its opinion and entered Findings of Fact and Conclusions of Law (Tr. 237, No. 14663; Tr. 323, No. 14664; Tr. 369, No. 14680) and Final Decrees (Tr. 246, No. 14663; Tr. 335, No. 14664; Tr. 381, No. 14665) awarding appellee damages.

QUESTIONS PRESENTED

The principal questions of law which are involved in these appeals may be summarized as follows:

1. May a union picket a foreign owned and registered vessel at a port of the United States where its picketing is for the purpose of:

   (a) Forcing the vessel's owner (appellee) to rehire alien former crew members who had refused to obey the lawful commands of the vessel's master and engaged in a sitdown strike? (The District Court said, "No," in all three cases.)

   (b) Forcing the vessel's owner to enter into new articles with such former crew members for a shorter term and at higher wages than provided in the articles which were breached by the said desertion of the same former crew members? (The District Court said, "No," in all three cases.)

   (c) Assisting another union, which had been enjoined from picketing, to accomplish the foregoing purposes? (The District Court said, "No" in Nos. 14664 and 14665).

   (d) Forcing the vessel's owner to replace loyal officers who were signed on the vessel's articles with others who were members of the picketing union? (In No. 14664, the Court below held, contrary to appellants' contention, that this was *not* the purpose of the picketing; but that if it were, it would have been an unlawful purpose.)

2. May a union which pickets a vessel with the hope and intention that other workers will observe its picket line, rely on such observance by other workers as independent wrongful acts which prevent its own picketing from being a proximate cause of the idleness of the vessel? (The District Court answered in the negative.)

3. In a forum where an unincorporated association may not be sued as an entity, may it and its collective assets be bound by a suit brought against proper representatives of its members as a class? (The court below said, "Yes.")

STATEMENT OF FACTS

In addition to challenging the trial court's decisions above, appellants seek to reverse numerous findings of fact made below. While liberal in assigning error to findings, appellants' brief is notably stingy in discussing the evidence. We deem it appropriate, therefore, before proceeding to argument on the questions of law, to give the Court a more adequate statement of facts.

Background

Appellee, a Panamanian corporation, acquired the SS RIVIERA, an American-built Liberty type cargo ship, in March, 1952, and registered it at the Port of Monrovia under the Liberian flag.

Ariticles were opened at Bremen, Germany, where the vessel was delivered to Appellee, for a voyage from

Bremen for a period of two years or until the earlier return of the vessel to a continental European port. A crew of foreign nationals, mostly British and German, was signed on. The Articles are on a standard form used in the British merchant marine. By the Articles it was agreed that British Maritime Board conditions were to apply to wages and hours of employment. Wages to be paid to the crew members and the provisions to be furnished to crew members were set forth in the Articles. The wage rates specified therein for each crew member were equal to or higher than those customarily then paid for similar employment in the British Merchant Marine. The crew members further agreed by the terms of said articles to be obedient to the lawful commands of the vessel's master in everything relating to said ship and the stores and cargo thereof, whether on board, in boats, or on shore.

The SS RIVIERA proceeded from Bremen to New Orleans, Louisiana, in ballast; from New Orleans to India with a cargo of grain; from India to Japan with a cargo of coal; and from Japan, in ballast, to Portland, where it docked September 3, 1952. At Portland, the vessel was to undergo an insurance survey, make repairs indicated by the survey, provision and load a cargo of wheat, for the carriage of which to India it had been chartered.

The foregoing facts are all unchallenged findings of the trial court (Tr. 237, 239-40).

On September 7 and 8, 1952, American seamen from a vessel in the berth next to the SS RIVIERA came

aboard and discussed "conditions" with the RIVIERA's crew (Tr. 84, 157). One of them awoke the Master at 3:00 a.m., September 8th and asked him to come down to the crew's quarters and discuss "wages and conditions". (Tr. 157). On September 8 or 9, 1952, the crew were in possession of copies of a leaflet describing the successful negotiation by the Sailors' Union of the Pacific of new articles for foreign seamen employed aboard the Panamanian vessel SS MAKIKI (Tr. 178). This leaflet (Exhibit 12, Supp. Tr. 411-415) explains that other workers respected a picket line placed on that ship and "consequently the ship was deader than a mackerel." As a result, the SUP statement continues, "after haggling around the Company agreed to our terms," which it sets forth in detail showing wage increases of from 150% to 300% and reduction in the period of the articles.

On the morning of September 9, 1952, twenty-one members of the crew of the SS RIVIERA went on strike, refused to obey the lawful orders of the master and refused to leave the vessel, which they picketed. They were joined by three other crew members a few days later (Tr. 138, 240-41).

On or about September 15, 1952, the striking crew members executed cards designating the Sailors' Union of the Pacific as their collective bargaining agent (Tr. 17). These cards had been circulated with the MAKIKI leaflet (Tr. 178).

The sitdown strike continued to September 26, 1952, when the strikers left the vessel in compliance with a

decree entered in a possessory libel suit filed by appellee (Tr. 241).

On October 3, 1952, the strikers libeled the vessel for wages claimed due, alleging breach of their articles by reason of unseaworthiness of the vessel in several particulars. Appellee answered and cross libeled for forfeiture of wages admittedly earned and damages because of the strike (Tr. 19).

Prior to the trial of those causes, it was agreed between counsel with the approval of the court that neither party would be required to post a bond; that the marshal's keeper would be removed from the vessel and that appellee could use the ship for any purpose it wanted, the court and libelants' counsel accepting the assurance of appellee's counsel that the owner would not remove the vessel from the jurisdiction of the court without posting such bond as the court might require on notice of intention to remove it (Tr. 292-295).

Appellee also filed a libel against the Sailors' Union of the Pacific, Benz and others for inducing the crew to breach the articles (Tr. 19). The District Court promptly held a consolidated trial on the issues raised by the wage libel, appellee's cross libel and separate libel against the SUP. Most of the evidence then received together with the pleadings, findings, decrees and opinion of the court in those causes were introduced in the cases now appealed (Tr. 45-193; Supp. Tr. 395-473).

In his opinion in those causes the trial judge held that the vessel was seaworthy; that appellee had fulfilled all of its obligations to the crew under the articles; that

the purpose of the crew members in striking had been to achieve higher wages and shorter articles; that they had been encouraged to do this by American seamen; but that there was insufficient evidence to connect the instigators with the Sailors' Union of the Pacific (Supp. Tr. 456-470). He declined to forfeit the wages admittedly earned by the crew (Tr. 441). Appellee paid the decree for those the day it was entered (Tr. 20).

Appellants do not now deny the correctness of identical Findings in these cases that the vessel was seaworthy, that appellee in all respects lived up to the articles and that the crew members refused to obey lawful commands (Uncontested Findings, Tr. 240-41). They assign as error, however, the court's Finding in each of these cases as to the purpose of the crew in striking (Specification of Error 1, Br. 5); and, also, the court's Finding that appellee was not deprived of the use of the SS RIVIERA by virtue of the wage libel (Specifications of Error 3, 5 and 8, Br. 7, 8, 10).

No. 14663

The Sailors' Union of the Pacific

The Sailors' Union of the Pacific is a voluntary, unincorporated association which operates under rules and regulations by virtue of which its members act as an organized body (Tr. 238). It does not have locals, but operates as a single unit. Its officers consist of a Secretary-Treasurer, Port Agents and Patrolmen. The Secretary-Treasurer of the union is its principal executive officer. Harry Lundberg held that position at all times

involved in these cases and was a resident of the State of California. The appellants Benz and Williams were the Port Agent and Patrolman respectively of the union in The Port of Portland, Oregon (Tr. 237-238). They were elected to those positions by a vote of the entire union membership (Tr. 159). They were the only officers of the union in the State of Oregon. The membership of the Sailors' Union of the Pacific was upwards of five thousand men, many of whom were employed on ocean-going vessels so that it would have been impractical and impossible to join all of them as parties in this suit (Tr. 238). The Sailors' Union of the Pacific and its members have an economic interest in the working conditions and wages of seamen employed aboard vessels engaged in the grain charter trade between ports of the United States and the Orient (Tr. 243). Benz and Williams were sued individually and as representatives of all of the members of SUP (Tr. 238).

Appellants assign as error the court's Finding of Fact and Conclusions of Law that members of the union constitute a class and that this is a true class suit, their sole factual contention being that all of the members of The Sailors' Union of the Pacific were not sailing in the grain charter trade and, therefore, did not have identical interests in the subject matter of this suit (Specifications of Error Nos. 9 and 10, Br. 10-12).

The striking members of the crew were in contact with appellant Benz from the early days of their strike (Tr. 163). As already stated, about September 15 they all designated the Sailors' Union of the Pacific as their

collective bargaining agent. Benz talked with Lundberg by telephone about the strike frequently in September. Lundberg inquired as to the wages paid aboard the vessel (Tr. 167). On October 10, 1952, a meeting was held of the members of the Sailors' Union at the Port of Portland (Tr. 165). A formal resolution was adopted by the members at Portland and referred to the organization for action at all of the other ports on the Pacific Coast. This resolution was adopted by headquarters in San Francisco and concurred in by the branches at the other ports about October 14, 1952 (Tr. 415-416). The resolution (Exhibit 14, Supp. Tr. 416-420) recounts the same allegations of unseaworthiness, which the crew had made in their wage libel. (Compare Supp. Tr. 417-418 with Supp. Tr. 456-7.) It goes on to recite that the crew members had appealed to the SUP for help, authorized it to bargain for them, and remained steadfast and loyal to the union despite pressure from appellee, the German Consul, local immigration authorities and the court. Finally it authorizes the picketing thereafter conducted. As Benz put it, "We went on record to help this crew out until they have won their beef." (Tr. 165). Commencing on October 14th the Sailors' Union of the Pacific took over the picketing of the SS RIVIERA, which picketing had previously been carried out by members of the crew or other unidentified individuals affiliated with them. The picketing was conducted as the collective bargaining agent of the members of the crew (Supp. Tr. 415-416; Tr. 241-2).

At the hearing on order to show cause why an injunction should not be issued against the union's picket-

ing, appellants filed the affidavits of all of the striking crew members. Since these are virtually identical (Tr. 261), only one of them has been reproduced in the printed record (Supp. Tr. 472, Exhibit 35). The affidavits recite the designation of the Sailors' Union of the Pacific as the bargaining agent for the affiants and "that the picketing of the SS RIVIERA is for the purpose of giving full publicity to the dispute which now exists, and which has existed, between the operators of said vessel and a majority of the crew members employed on said vessel."

Appellants assign error to the court's Finding of Fact that the picketing by the Sailors' Union of the Pacific was for the sole purpose of compelling appellee to reemploy the crew members who went on strike and were discharged, at more favorable wage rates and conditions (Specification of Error 2, Br. 6).

The injunction was issued on November 26, 1952. It is admitted that appellee was able to proceed with the repairs of the vessel and preparation for loading its cargo immediately after the pickets were removed and that it continued to so work the vessel until November 28, 1952, when a new picket line was established by the Local 90 of the National Organization of Masters, Mates, and Pilots (Tr. 304-305).

No. 14664

Local 90, National Organization of Masters, Mates and Pilots A. F. of L.

The National Organization of Masters, Mates and Pilots of America is an unincorporated association whose members operate under the rules and regulations by virtue of which its members act as an organized body (Tr. 324). Local 90 of the NMMP is composed of masters, mates and pilots sailing on ocean-going vessels (Tr. 195). It is a coast-wide organization, having more than a thousand members, many of whom were employed on ocean-going vessels so that it would have been impractical and impossible to join all of them as parties to this suit (Tr. 324). Its officers include a president, a secretary-treasurer, its principal executive officers, and business agents or representatives at the Ports of Portland, Seattle and San Pedro. Local 90 has an economic interest in the working conditions and wages of masters and mates employed aboard vessels engaged in the grain trade (Tr. 331). The Business Agent or Representative at the Port of Portland is appellant M. D. MacRae. He is the only officer of the union in the State of Oregon (Tr. 195, 301, 324). He and certain of the pickets were sued both individually and as representatives of all the members of Local 90 (Tr. 325).

When Mr. MacRae read in the paper that the court had ordered the SUP to remove the pickets he called Mr. Benz. This was their conversation:

> MacRAE: "How about this injunction that the court has put upon you?"
>
> BENZ: "Yes, they put a restraining order against me and I guess it will be a temporary injunction, what it was."
>
> MacRAE: "Well, what are you going to do about it?"
>
> BENZ: "Nothing, we have to take our pickets off."
>
> MacRAE: "O. K. Well then I can put pickets on the ship. There is no restraining injunction against me." (Tr. 197)

MacRae further testified, "We are affiliated with the A. F. of L. just the same as the SUP is concerned, and we always back one another." (Tr. 203).

When he found out that the ship was working and was going to sea, MacRae notified Local 90's members in Portland to come in for the purpose of discussing a picket line (Tr. 202). He also discussed it with other officials of Local 90, viz., Captain May, the president, and Captain Cross, the secretary-treasurer in San Francisco. They told him to use his own discretion; and he ordered the picket line (Tr. 196).

Prior to placing the picket line MacRae had made no demands upon the owners or agents of the vessel (Tr. 197-8). The court below in its opinion in the SUP case had emphaisized that the SUP was not seeking the jobs for its own members, but was seeking the reemployment of the former crew members. At the trial of this case MacRae insisted that the union put the picket line on to obtain employment for its men as master and mates aboard the SS RIVIERA (Tr. 198; Tr. 204). The

By-laws of the National Organization of Masters, Mates and Pilots provide that its membership shall be limited to personnel licensed by the United States (Exhibit 52, p. 4). The master and mates employed aboard the RIVIERA were all British nationals and members of British unions (Tr. 206). There is no evidence that they were licensed by the United States. The master and first and second officers testified that they were licensed by Britain (Tr. 108, 133, 178).

Appellants specify as error the court's finding that the picketing by Local 90, NMMP was for the purpose of compelling appellee to reemploy the crew members who went on strike, and who were discharged, at more favorable wage rates and conditions and for the purpose of helping the Sailors' Union of the Pacific in obtaining its objectives after it had been restrained from picketing. They also specify error in the Court's finding that the vessel's officers were not offered membership in Local 90 and were not eligible for such membership (Specification of Error 2, Br. 6-7).

The injunction was issued on December 8, 1952. It is admitted that appellee was able to proceed with the repairs of the vessel and preparation for loading its cargo immediately after the pickets were removed, and that it continued to work the vessel until December 10, 1952, when a new picket line was established by the Atlantic and Gulf District of the Seafarers International Union, A. F. L. (Tr. 351).

No. 14665

Atlantic and Gulf District S.I.U., A. F. of L.

The Atlantic and Gulf District, S.I.U., A. F. of L. is a voluntary unincorporated association operating under rules and regulations by virtue of which its members act as an organized body (Tr. 371). Appellant Morrison was the Northwest Representative of the Atlantic and Gulf District with headquarters in Seattle, Washington. The chief executive officer of the Atlantic and Gulf District is a Mr. Hall whose headquarters is in Brooklyn, New York (Tr. 213-14). The Atlantic and Gulf District had a membership upwards of 5,000 men, many of whom were employed on ocean going vessels, so that it would have been impracticable and impossible to join all of them as parties in this suit (Tr. 371). This union also has an economic interest in working conditions and wages of seamen employed on vessels engaged in the grain trade (Tr. 378). Appellants Morrison and Johnson were sued individually and as representatives of all members of the Atlantic and Gulf District (Tr. 371).

The Atlantic and Gulf District and the Sailors' Union of the Pacific are affiliated organizations in the Seafarers' International Union. Harry Lundberg is the President of the Seafarers' International Union as well as Secretary-Treasurer and chief executive officer of the Sailors' Union of the Pacific (Tr. 214-215).

Morrison first learned of the RIVIERA on December 9, 1952, when he received a telephone call from

Lloyd Gardner, one of his superior officers in the Atlantic and Gulf District. The call was from the San Francisco office of the Atlantic and Gulf District (Tr. 216) which is located in the Sailors' Union of the Pacific Building in that city (Tr. 222-23).

Having been asked to look into the matter, Morrison came to Portland bringing with him appellant Johnson for the purpose of establishing a picket line if one were needed (Tr. 223, 228). On arriving in Portland, he first contacted Mr. Benz of the Sailors' Union of the Pacific. At Benz' suggestion, he had a conference with Tanner & Carney, the attorneys who had represented the Sailors' Union of the Pacific, and the Masters, Mates and Pilots as well as the crew members in preceding litigation (Tr. 216-17).

In its opinion in the MacRae Case, the Court had emphasized that there were no jobs open for masters or mates on the vessel and had also emphasized that Local 90 made no attempt to contact the owners about jobs prior to establishing its picket line. Appellant Morrison attempted to contact the master of the vessel, but not finding him aboard ship or at the offices of the ship's agents, he quickly gave up and established a picket line for the Atlantic and Gulf District (Tr. 218-19), contending that it wished the jobs for its members and wished to raise the wage rates paid aboard the vessel (Supp. Tr. 480). The evidence showed that the chief officer of the Riviera had left Portland for Vancouver, B. C. on December 7, 1952, to sign on needed crew members. He reported a full crew was signed on December 10, 1952 (Tr. 230-31, 233).

Appellants specify as error the Court's finding that the picketing by the Atlantic and Gulf District was for the purpose of compelling appellee to re-employ the crew members who went on strike and who were discharged, at more favorable wage rates and conditions and for the purpose of helping the Sailors' Union of the Pacific in obtaining its objectives after it had been restrained from picketing (Specification of Error 2, Br. 6-7).

It is admitted that the shore workers returned to work immediately after the removal of the picket line and completed loading and repairs (Tr. 351).

SUMMARY OF APPELLEE'S ARGUMENT

There is ample evidence to support the findings of the Court below that the crew of the SS RIVIERA went on strike to obtain higher wages and a shorter term than provided in the articles under which they were bound to the vessel; that the SUP was picketing as their collective bargaining agent and for the sole purpose of forcing appellee to rehire the mutinous crew upon the terms which they had sought; and that Local 90 of the Masters, Mates and Pilots and the Atlantic and Gulf District SIU undertook the picketing, after the SUP had been enjoined, for the sole purpose of forcing appellee to rehire the striking former crew members on terms more favorable than provided in the articles which they had breached and to assist the SUP in realizing that objective.

A seaman under valid articles has no right to bargain concerning, wages, hours and working conditions, either himself or through a so-called collective bargaining agent. Because of the necessities of maritime discipline and in the light of the special protection surrounding the relationship of a seaman to his ship, it has been uniformly held that there is no right to bargaining, individual or collective, during the term of articles. The picketing in these cases was therefore for an unlawful purpose. The unlawful purpose doctrine is not confined to cases in which picketing is for the purpose of forcing an employer to commit an illegal act. It also applies to cases in which the picketing has an objective which is condemned by public policy, as well as to those cases in which the picketing is in support of the breach of a valid labor agreement.

The National Labor Relations Act as amended by the Taft-Hartley Act has no applicability to these cases. The relationship of a seaman under articles to his ship is governed by the paramount maritime law rather than general labor legislation; and the rights to strike and picket guaranteed by general labor legislation have no applicability to seamen during the period of articles. Moreover, in these cases we are dealing with a foreign crew serving aboard a foreign vessel which is owned by a foreign shipowner. The labor legislation of the United States is not intended to govern labor relations on a tramp vessel such as the RIVIERA which calls only briefly at ports of the United States.

The Norris-LaGuardia Act is inapplicable to the facts of these cases and was not a bar to the injunctions form-

erly issued by the District Court. That Act was intended to prevent injunctions in labor disputes, and had for its purpose the promotion of collective bargaining. It has no applicability here both because of the inappropriateness of collective bargaining to the situation of seamen bound to a vessel by valid shipping articles and also because it was not intended to apply beyond the territorial limits of the United States and to effect a labor situation on a foreign tramp vessel owned by a foreign owner and with a foreign crew. In any event, however, the propriety of the injunctions under the Norris-LaGuardia Act is not now before this Court. Appeals from those injunctions were formerly dismissed with instructions to try the damage actions as if they had not been issued. Appellants cannot now claim that there was no jurisdiction to award damages because of a lack of equity jurisdiction, since they never moved in the court below for trial of these cases as actions at law or before a jury and, therefore, have in no way been prejudiced by the court's hearing of the cases.

The District Court correctly found that picketing by appellant unions was the proximate cause of the vessel's idleness, and that appellee was not deprived of the use of its vessel during the period of picketing by any technical custody of the United States Marshal or by the lack of a crew aboard the vessel. The acts of shore employees in refusing to cross the picket lines of appellants were not independent intervening wrongful causes of appellee's damage. Rather they are the very acts which appellants hoped and intended would follow from their picketing.

Appellant unions are each unincorporated labor organizations whose members have common economic interests which they have banded together under rules and regulations to promote as an organized body. The court below correctly held that they constituted classes having sufficiently identical interests in the subject matter of these suits to be sued in a class action. It is admitted that their members were too numerous to be all joined individually as defendants and that appellee served all the local officers of those unions, individually and as representatives of the entire membership. These are true class actions and the class action is a proper proceeding in which to recover damages from a union for its torts. While individual members of the unions not personally served in these cases are not bound by the judgments to the extent that execution could issue against their personal assets, the court below correctly directed execution against common assets of the unions as well as those of the individual members who were personally served.

ARGUMENT

THE PURPOSE OF THE PICKETING

Answer to Appellants' Specifications of Error 1 and 2 (Br. 5, 6)

Appellants say the court below erred in determining that both the strike by some of the crew members of the RIVIERA and the subsequent picketing by appellant unions was for the purpose of requiring appellee to grant the rebelious crew new articles of shorter duration and at higher wages than had been agreed to by them. We

shall not prolong the brief by repetition of all the evidence already set forth which so fully sustains these findings, but rest on the following brief summary.

It is not denied that the vessel was seaworthy and that appellee fulfilled its obligations to the crew. Nor can it be denied that most of appellants' picketing occurred after those facts had been judicially determined between the crew and appellee in a joint proceeding to which the SUP was an interested party. In view of this, how can appellants now contend that the court erred in its companion finding that the allegations of unseaworthiness were only a sham covering for the real aim of different articles? In view of the interested participation of the SUP in the prior litigation which first produced that finding and the position of all the unions as agents for the strikers, appellents should be collaterally estopped to deny its bindng effect here. 30 Am. Jur., "Judgments" §248, p. 977. But, whether bound or not, they cannot deny the evidence of agitation for new articles by circulation of the inflammatory MAKIKI leaflet and its conjunction with the start of the sit-down strike. Nor can they explain the persistence of the crew after their allegations of unseaworthiness were determined false, as shown by their affidavits filed in one of these subsequent cases.

As for the purpose of the SUP, suffice to say its own evidence clearly supports the challenged finding. The crew's affidavits, which it filed, and the resolution which it adopted state that purpose. Benz' very revealing interpretation of the resolution, it will be remembered, was

solely that "we went on record to help this crew out until they have won their beef."

The NMMP and SIU denied representation of the crew; but the evidence clearly shows that they were just backing up the crew and SUP in their aim. The Court had before it these unions' lack of any evidenced interest in the RIVIERA for the nearly three months it was in port prior to the first injunction; the affiliations of the unions with the SUP and their proven policy of supporting it; the hasty conferences between their officials and those of the SUP; and the window dressing adaption of action to language of the court's opinions. The fact that counsel for appellants represented the striking crew members as well as all of the unions involved can hardly be overlooked in a discussion of the purpose of the picketing, although we recognize that there is no impropriety about their having more than one client.

THE PURPOSE OF THE PICKETING WAS UNLAWFUL

Answer to Appellants' Specifications of Error 7, 11 and 12 (Br. 9, 12-13) and Argument (Br. 15-28)

There is no question but that the striking crew members had entered into valid articles which bound them to the vessel for a period of two years or until the vessel returned to a continental European port. Appellants have abandoned any contention that there was any justification for the crew in refusing to comply with their contract and to obey the lawful orders of the master. The courts of the United States have furthermore consistently held that there is no right to strike or to bargain

collectively in the crew during the existence of the articles.

In *Rees vs. U. S.*, 95 F. 2d 784, the Court of Appeals for the Fourth Circuit reviewed the many protections both by legislation and the general maritime law which surround the employment relationship of seamen on the vessel on which they serve. The court pointed out that the safety of lives and property aboard ship depend upon a high discipline which is destroyed by strikes and refusal to obey orders of the master. It pointed to the dependence of the seaman upon his vessel and that neither the shipowner nor the seaman is in a good bargaining position in a foreign land, whose shores may be inhospitable to the crew and unproductive of any substitutes for them. For these reasons the court stated:

> "When articles are signed by a crew for a voyage, all bargaining, individual and collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously." (95 F. 2d 784, at 792)

This question has also been passed upon by the United States Supreme Court in *Southern Steamship Company vs. NLRB,* 316 U.S. 31, 86 L. Ed. 1246, 62 S. Ct. 886, and by the Court of Appeals for the Fifth Circuit in *Peninsular & Occidental Steamship Co. vs. NLRB,* 98 F. 2d 411. In each of these cases the court held that seamen who had gone on strike while under articles were not entitled to reinstatement. In each case the NLRB had found the shipowner guilty of an unfair labor practice in discharging the striking crew members and order-

ed reinstatement of the men in order to effectuate the purposes of the National Labor Relations Act. Nevertheless the courts held that reinstatement under these circumstances, despite the public policy of the Act, would not be enforced to the detriment of maritime discipline.

Since neither the crew nor its representatives had any right to negotiate new or different terms of agreement, there obviously could be no labor dispute involved in this case. A labor dispute is one which involves wages, hours and working conditions and representation for collective bargaining. Any such rights had been terminated by the execution of the articles which each of the striking seamen had signed and which constituted a contract between himself and the shipowner.

Appellants contend that their picketing, even though its purpose was to compel appellee to re-hire the striking crew members under articles more favorable to them than those which they had breached, was not for an unlawful purpose because it did not require the appellee to commit an illegal act. Appellants cite many cases holding that picketing is for an unlawful purpose when it is intended to compel the employer to do an illegal act. We do not disagree with those cases. Appellants make no reference, however, to numerous decisions in which picketing was held to be for an unlawful purpose even thought the employer was not being coerced into doing an illegal act.

The courts have declared that picketing is improper when its purpose is contrary to public policy and good

morals. In *Schwab vs. Moving Picture Machine Operators, Local No. 159,* 165 Ore. 602, 109 P. 2d 600, the Supreme Court of Oregon declared picketing unlawful where the purpose of the picketing union was to obtain a monopoly of labor by requiring the employer to discharge present employees and hire members of the union in their place. The employer was not being required to violate any statute. The purpose was, however, held to be unlawful because of the union's monopolistic aim. Incidentally, this case clearly shows the trial court's correctness in its alternative conclusion in No. 14664 that picketing by the NMMP to require appellee to replace its officers with members of that union would be for an unlawful purpose.

In *International Brotherhood vs. Hanke,* 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773, the United States Supreme Court upheld an injunction granted by the Supreme Court of Washington against picketing for an unlawful purpose, namely requiring partners who conducted their business without any employees to join the union. It was not illegal for the partners to join the union, but the court found that the aim of the union itself was contrary to public policy as announced by the courts. Likewise, in *Rees vs. U. S.,* supra, *Southern Steamship Co. vs. NLRB,* supra, *Peninsular & Occidental Steamship Co. vs. NLRB,* supra, the collective action of the seamen and their supporting unions were not for the purpose of requiring the shipowner to do any illegal act. The shipowner could have complied with their demands without violating any law, but the courts nevertheless

held the purpose was contrary to the public policy governing seamen under articles.

Appellants also ignore a long line of cases holding that picketing is for an unlawful purpose where it seeks to set aside, or invalidate, a collective bargaining agreement in effect between the employer and the picketing workers or union. See the extensive note in 2 A.L.R. 2d 1278, where at page 1281 it is said:

> "As a general proposition, the right to strike and picket, though otherwise recognized, cannot be exercised during the life of a valid labor agreement which fails by its terms to preserve such rights."

The articles of the "RIVIERA" were a labor agreement which included substantially all of the terms and conditions usually found in labor agreements. The articles included specifically the British Maritime Board regulations and the scales of pay and working conditions established through collective bargaining by the British maritime unions. The articles contained a provision more sweeping than the usual no-strike agreement, to-wit, the agreement on the part of each crew member that he would obey the lawful orders of the master. Breach of such an agreement involves more serious consequences than the breach of a collective bargaining agreement ashore.

Moreover, the vessel's obligations under the articles continued with respect to the non-striking crew members and the shipowner could not have terminated the articles and entered into new articles providing for a shorter term and different conditions without the con-

sent of the loyal crew members. It may be argued that the SUP could have negotiated an agreement so favorable that the loyal crew members would have agreed to a termination of the articles. This is, however, mere speculation and there is no evidence as to the willingness of the loyal crew members to surrender their right or whether a shorter term than provided for in the articles would have been acceptable to them.

The unlawful purpose of the picketing on the part of the striking crew members is plainly established. In *Rees vs. U. S.*, supra, the striking members of the crew of an American ship were indicted for violation of United States Criminal Code, Section 292, 18 USCA, Section 483 for acts comparable to those of the crew of the RIVIERA. The Court of Appeals sustained their conviction of the violation of the Criminal Code in striking and refusing to obey the lawful orders of the master.

In *Southern Steamship Co. vs. NLRB,* supra, a strike of the crew because of the refusal of the shipowner to bargain with a union was held to be mutiny. The evidence clearly indicates that appellants aided and abetted the mutinous crew of the RIVIERA and attempted to secure for the mutinous crew a better contract as a reward of their unlawful conduct. The Court of Appeals for the Fifth Circuit in *Peninsula & Occidental Steamship Co. vs. NLRB,* supra, held that a reinstatement of the striking crewmen in itself would have rendered the vessel unseaworthy.

Picketing by appellants was in support of an illegal strike by the seamen. It was nothing more than an at-

tempt by such seamen to gain through appellants as their representatives that which they themselves could not demand. Such purpose is clearly unlawful.

Appellants admit that picketing is not protected "free speech" where it is for an unlawful purpose (Br. 18).

THE TAFT-HARTLEY ACT IS INAPPLICABLE TO THESE CASES

Answer to Appellants' Specification of Error 6 (Br. 9) and Argument (Br. 19-23)

The vessels and crews involved in the *Rees, Southern Shipping Co.* and *Peninsula and Occidental* cases, supra, were American, yet the courts expressly held that the right of labor to strike and picket as guaranteed by the National Labor Relations Act is not applicable even to an American crew aboard a United States flag vessel during the continuance of valid articles. It would appear that the paramount maritime law defining the rights and obligations as between shipowner and crew governs over general labor legislation such as the Taft-Hartley Act. Counsel for appellants ignore this in their lengthy discussion of preemption.

Moreover, in the cases before this Court we are not dealing with an American vessel and crew, but with a foreign flag vessel, a foreign shipowner and a foreign crew.

The RIVIERA was a tramp freighter which touched ports of the United States irregularly for brief periods. If the contractual relationship between the shipowner and his crew while under valid articles is to be sub-

jected to the laws governing labor relations in every foreign port, chaos is certain to ensue. If the rights of the shipowner and of his crew are to vary from port to port, it is plain that foreign commerce will be disastrously impeded.

The RIVIERA was foreign territory. The members of the crew were foreigners, predominately German and British. Their articles governed their relationship upon the high seas as in the ports of every foreign country, all of which demonstrates the inapplicability of local labor law and particularly the National Labor Relations Act as amended.

The National Labor Relations Board has heretofore had this problem directly before it and has held that it has no jurisdiction under such circumstances to determine the collective bargaining agent for the crew of a foreign vessel. *Sailors' Union of the Pacific,* Case No. 20, R.C. 809, May 1, 1950, C. C. H. Labor Reports, 1950-51, NLRB Decisions, Par. 1,081.

THE VALIDITY OF THE PRIOR INJUNCTIONS UNDER THE NORRIS-LaGUARDIA ACT AND THE EQUITY JURISDICTION OF THE COURT BELOW HAVE NO RELEVANCE TO THE JUDGMENTS NOW BEFORE THE COURT

Answer to Appellants' Specification of Error 6 (Br. 9) and Argument (Br. 23-28)

Appellants argue that the prior injunctions should not have been issued because a labor dispute existed within the meaning of the Norris-LaGuardia Act; and that, since the court could not grant that equitable relief, it had no jurisdiction to award damages.

In the first place we contend that the Norris-La-Guardia Act was no bar to the issuance of the injunctions in these cases. That Act declares its purpose to be that the workers shall:

> ". . . be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 USCA §102)

But as already pointed out here, collective bargaining and designation of representatives for that purpose have no applicability to seamen during the term of the articles by which they contracted with the shipowner. This case is analogous in that respect to the case of *U. S. vs. United Mine Workers of America,* 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677. In delivering the opinion of the Court, Chief Justice Vinson stated,

> "The purpose of the Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining . . .' These considerations on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees." (330 U.S. at 274, 91 L. Ed. at 903)

The Supreme Court therefore held in that case that the Norris LaGuardia Act did not prevent an injunction against the Mine Workers' picketing.

Moreover, it would seem that, like the Taft-Hartly Act and other national labor legislation, the Norris-LaGuardia Act was not intended to influence labor relations between a foreign crew and foreign shipowner for performance of services aboard a foreign tramp vessel. Although not specifically stated in every act which it passes, Congress must be presumed to be legislating for the United States and not for the world.

But in any event the propriety of the former injunctions is of no concern in these proceedings. This Court formerly held that the appellee had a right to prosecute its claim for damages without reference to whether those injunctions were valid. Upon the remand of the case, appellants answered and stipulated for trial of the cases before Judge Solomon. At no time did they move to transfer the case from the equity side of the court to the law side of the court or for trial by jury. Under the unified federal procedure as set forth in the Federal Rules, appellants clearly waived any right which they might have had to a jury trial and are estopped to claim that the court lacked jurisdiction to hear the case. As stated by Professor Moore,

> "When it is apparent to the defendant that on his theory all or certain issues of the case are legal, despite the characterization given by the plaintiff, the defendant must disclose his position by making demand for jury trial within the time allowed by Rule 38 (b) and a failure to do so constitutes waiver of any right to jury trial the defendant may have had." (5 Moore, Federal Practice, 2d Ed., 38.17, p. 163)

This unfounded aside in appellants' argument does not deserve serious consideration.

THE PICKETING WAS THE PROXIMATE CAUSE OF APPELLEE'S DAMAGE

Answer to Appellants' Specifications of Error 3, 5, and 8 (Br. 7, 8, 10) and Argument (Br. 28-33)

Appellants contend that appellee could not have used its vessel during the period of the picketing both because it was in the custody of the court and because there was no crew aboard. They also contend that the acts of shore employees in refusing to cross the picket line were intervening independent and wrongful acts which prevented the picketing itself from being a proximate cause of the vessel's idleness. It is well to note that they do not challenge the court's finding that appellees suffered damage through the idleness of the vessel in the amount of $900 per day, nor the total amount of the damages fixed by the court in each case (Tr. 244, 332, 377).

Appellants offered no evidence that the vessel was in the custody of the Marshal, although appellee specifically denied appellants' contention that it was in the Marshal's custody (Tr. 31). This was stated as an issue in the Pre-Trial Order (Tr. 36). The facts as already stated are that, by stipulation between counsel for the libelant crew members, who are counsel for appellants here, and the owners of the RIVIERA, the ship was released from the custody of the Marshal, and it was agreed that its owners could do with it what they wanted. This was done upon the assurance of counsel for the owners that the vessel would not depart from the jurisdiction of the Court without posting such bond as the Court might require (Tr. 292-295).

We are at a loss to understand the significance of appellants' argument that no liens could attach to a vessel in *custodia legis* (Br. 32). But in any event that is not the case here, for as stated in 2 Benedict on Admiralty, 6th Ed., §298, p. 382:

> "If the arrest is merely formal, and the vessel, by consent of the parties is permitted to proceed about her business in the possession of one or more of the parties, instead of being retained in the possession of the Marshal, then liens can arise in the usual manner despite the fact of the seizure."

Admittedly during most of the period of picketing, the RIVIERA was short about 25 men of the full crew. But there was no need for a crew until the vessel was ready to sail. This was admitted by appellant MacRae (Tr. 203). There was testimony that a crew could have been obtained within less than three days if that were required (Tr. 212). Finally there was evidence that a crew was easily obtained within three days when the master determined it would be needed (Tr. 230-231). Appellee was under a duty to mitigate damages, and it would have been ridiculous for it to have obtained a crew to sit idle on the vessel, running up its damages, during the period of picketing.

The conclusive answer to these arguments of appellants is in the admitted fact that appellee was able to proceed with repair and loading of the vessel during the periods November 26th - 28th and December 8th - 10th, 1952, the intervals between picket lines, and that the vessel, completed repairs, loaded and sailed shortly after the last picket line was withdrawn (Tr. 351).

Appellants argue that the RIVIERA was idled as a result of the refusal of shore employees to cross the picket lines set up by appellants. With this we agree. They argue, as a matter of law, that these acts of shore employees were independent, intervening causes of damage so that the picketing itself could not be held a proximate cause. To sustain this position, they argue that the acts of the shore employees were themselves wrongful and illegal acts. This strained argument is necessary, for, as they admit, if the refusal, of the shore employees to cross the picket line was innocent and legal, then it could not operate as an independent or intervening wrong or cause of appellee's damage (Br. 29-30).

In support of the argument that the shore employees acted illegally and wrongfully, appellants cite Judge Fee's opinion in *Montgomery Ward and Company, Inc. vs. Northern Pacific Terminal Company et al.*, 32 L.R.R.M. 2386 (D. Ore. 1953). Nothing in that case sustains the argument made. That was a case in which the plaintiff sued various common carriers for breach of their statutory and common law duties to provide service to plaintiff as a member of the public. The court held that a common carrier was not relieved of its duty to provide service by the fact that the person requesting the service was subject to a picket line, at least in the absence of clear evidence that the carrier had done everything within its power to provide such service. Nowhere in the court's opinion did it state that employees of the public carrier who refused to cross a picket line thereby committed an illegal act. Indeed, the court

emphasized the fact that the carriers made no serious effort to require their employees to cross the picket line.

In this case, neither the stevedores and other ship fitting and repair companies nor their employees were under any statutory or common law duty to provide appellee with any services. There is no evidence that there was even a contractual duty on the employers to furnish the services contracted for in the fact of a picket line. Certainly it cannot be said that there was any legal duty of the employees of those contractors to cross the picket line so that breach of that duty could be declared an illegal or wrongful act.

Appellants also cite *NLRB vs. Rockaway News Supply Co.* (CA-2 1952), 197 F. 2d 111, *aff'd* 345 U.S. 71, 97 L. Ed. 832, 73 S. Ct. 519; *NLRB vs. Illinois Bell Telephone Co.* (CA-7 1951), 189 F. 2d 124, *cert. den.* 342 U.S. 885, 96 L. Ed. 663, 72 S. Ct. 173. They are correct in stating that those cases hold an employer may discharge an employee who refuses to perform his duty to the employer when that involves crossing a picket line. But this does not make the acts of the employees "illegal"; and nothing in those cases so holds. On the contrary, in the *Rockaway News* case the court specifically held:

> "In considering this question we accept the contention of the Board that the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of 'the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection' which is expressly guaranteed by Section 7 of the Act." (197 F. 2d 111 at 113)

The trouble comes from appellants' loose use of the words "illegal" and "wrongful". "Illegal" normally means in violation of a statute. "Wrongful", we take it, means tortious. What statute did the shore employees violate to make their conduct illegal? What duty to appellee did they breach to make them liable in tort?

The acts of the shore employees in refusing to cross the picket lines were such as would not only naturally and probably follow from the picket line, but were the acts specifically hoped for and intended to follow from the picket line. The picketing was the proximate cause of plaintiff's damage.

THE DISTRICT COURT CORRECTLY ENTERED JUDGMENT AGAINST APPELLANT UNIONS AND THEIR MEMBERS AND PROVIDED FOR EXECUTION AGAINST PROPERTY HELD BY THE UNIONS

Answer to Appellants' Specification of Error 9 and 10 (Br. 10-12) and Argument (Br. 33-36)

Appellants correctly state that Oregon has not yet adopted the rule of the Coronado case (*United Mine Workers of America vs. Coronado Coal Co.* (1922), 259 U.S. 255, 66 L. Ed. 975, 42 S. Ct. 570, 27 A.L.R. 762). They are also correct in stating that the capacity of appellant unions to sue or be sued should be determined under the law of Oregon.

While it has not adopted the rule of the *Coronado* case, Oregon has allowed unions to sue and be sued by means of the class suit for many years. See for example the recent decision of the Oregon Supreme Court in *Lonsford, et al vs. Burton, et al.* (1953), 202 Ore. 497,

...P. 2d.... In that case the defendants were sued as representatives of Local 72 of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America. Although the named defendants filed answer "on behalf of themselves only and not on behalf of any or all other members", the court nevertheless stated, "We shall treat the answer of the named defendants as an answer made on behalf of the International." (202 Ore. 497, at 511-512).

The class suit is specifically provided for by statute in Oregon:

> "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impractical to bring them all before the court, one or more may sue or defend for the benefit of the whole." (ORS § 13.170, formerly O.C.L.A. § 9-106)

No Oregon case holds that a union may not be sued or its assets reached through the medium of a class suit. *Cousins vs. Taylor,* 115 Ore. 472, 239 Pac. 96 (1925), cited by appellants is not at all in point. That was a suit brought against fifteen individual members of an unincorporated association. No attempt was made to reach the assets of the association or to obtain a judgment against other members of the association not personally served.

In other states the right to recover damages from a union based upon service on individuals as representatives of all of its members has long been well settled. See for example *St. Germaine et ux. vs. The Bakery and Confectionary Union No. 9 of Seattle et al.* (1917), 97

Wash. 282, 166 Pac. 665. That was a case identical with this in that the plaintiff had sought an injunction and damages for picketing.

In *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen et al.*, 148 F. 2d 403 (1945, C.C.A. 4), the plaintiff brought suit against the union for discrimination on account of race in establishing job eligibility, naming it as an entity and also naming one of the officers of a local lodge as a representative of all of the members of the union. The court held that while service on the union as an entity was not adequate, the suit could be treated as a class suit and recovery had against the union. One of the questions considered by the court in that case was: "May a class suit be brought against an unincorporated association in such a way as to bind the Association?" Chief Judge Parker, speaking for the court, answered in the affirmative. He pointed out:

> "The right to bring a class suit to enforce the liability of an unincorporated association existed long prior to the adoption of the Federal Rules of Civil Procedure." (148 F. 2d 403, at 404)

He also stated:

> "Even in a state like West Virginia which adheres to the common law rule that an unincorporated labor association may not be sued as an entity, see Milam v. Settle, W. Va., 32 S.E. 2d 269, such an association may be sued in the state courts by naming as parties and serving individually some of the members composing the association." (148 F. 2d 403, at 405)

Subsequently, a judgment for $1,000 in damages in favor of plaintiff against the Brotherhood was affirmed,

Brotherhood of Locomotive Enginemen vs. Tunstall, 163 F. 2d 289.

Other recent decisions have established beyond doubt that an unincorporated labor organization may be sued for its torts through the medium of the class suit. See *Montgomery Ward and Co., Inc. vs. Langer et al.,* 168 F. 2d 182 (1948, C.C.A. 8) (Libel published in union newspaper); *Ketcher et al. vs. Sheetmetal Workers International Association et al.,* 115 F. Supp. 802 (1953, E.D. Ark. W.D.) (Conspiring to deprive plaintiff of union workers and to bring about breach of collective bargaining agreement); *Pascale et al. vs. Emery et al.,* 95 F. Supp. 147 (1951, D. Mass.) (Libel published in union newspaper). Professor Moore in his work on Federal Practice, Vol. 2, page 2235 ff., cites suits against unincorporated associations as typical of what he calls the "true class suit". In discussing the affect of a judgment in a true class suit he states,

> "In an action to recover damages against an unincorporated association, brought as a class action by naming representatives of the association as defendants, the judgment should be binding on the association and also, insofar as the action asserts individual liability of the members, it should be binding on the individuals named as defendants and duly served with process, but not upon other individual members." (3 Moore, Federal Practice (2d Ed.), §23.11 at p. 3465)

In *Montgomery Ward and Co. vs. Langer,* 168 F. 2d 282, the suit was originally brought against 80 individual defendants and two named unions, the individuals being served as such and as representatives of all of the mem-

bers of the unions. Motions were filed alleging that the unions could not be sued in their own name, and that diversity did not exist as between plaintiff and all of the defendants. Plaintiff then dismissed the action as against the two unions and eight of the individual defendants, so that at the time the case was before the court only individuals were named as defendants. Nevertheless, the court held that this was a class suit and that the court had jurisdiction over the union as a class.

The concurring opinion of Judge Johnsen in that case holds no more than that a judgment in a class suit cannot bind the personal assets of individual members of the class not made parties personally to the suit. The quotation from his opinion in appellants' brief (Br. 35) is not a single statement as it is made to appear. Rather, appellants have omitted large portions of his opinion which appear between the quoted paragraphs. Among the statements which they omit are the following:

> "More than mere class membership or association representation would therefore substantively be necessary to establish a liability collectible out of individual or personal estate." (168 F. 2d 182, at 189)
>
> "Conceivably, such an adjudication could be a helpful step in the process of ultimately reaching any fund existing for general union purposes, where the union had been guilty of a legal wrong." (168 F. 2d 189, at 190)

The substantive right to reach the assets of an unincorporated association where it has been guilty of a legal wrong is settled in all jurisdictions that have considered the question. The only point of difference lies in the

procedure to be followed, some following the principle of the *Coronado* case that the union may be sued in its own name as an entity, while others require that all of the members be joined in a class suit. The latter was done here and is proper under the law of Oregon.

We are at a loss to understand appellants' argument that the members of each union did not constitute a class, since all of them were not sailing on vessels in the grain trade. The Admitted Facts and uncontested Findings are that the members of each union constituted an organized body and that each union and its members had common economic interests. Moreover, the evidence showed that the actions taken by the unions in picketing were not isolated actions of a few members but were undertaken only after consultations among the unions officers and, in the cases of the SUP and Local 90, NMMP, after meetings of the membership had been held. Sufficient identity of interest is certainly established by these facts.

CONCLUSION

The evidence clearly established that appellants attempted to coerce appellee into terminating the ship's articles, an agreement lawfully entered into, and rehiring the mutinous crew members under a more favorable agreement. The means used by the union in attempting to accomplish these purposes resulted in substantial damage to appellee and the District Court has ordered appellants to respond in damages.

The judgments of the District Court should be affirmed.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD & TATUM,
JOHN D. MOSSER,
GUNTHER F. KRAUSE,

Attorneys for Appellee.

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

M. D. MACRAE, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

JEFF MORRISON, et al.,
Appellants,

vs.

COMPANIA NAVIERA HIDALGO, S.A.,
Appellee.

APPELLANTS' REPLY BRIEF

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

K. C. TANNER and
RICHARD R. CARNEY,
1041 Pacific Bldg., Portland 4, Oregon,
Attorneys for Appellants.

WOOD, MATTHIESSEN, WOOD & TATUM,
JOHN D. MOSSER,
1310 Yeon Bldg., Portland 4, Oregon,
GUNTHER F. KRAUSE,
916 Portland Trust Bldg., Portland 4, Oregon,
Attorneys for Appellee.

FILED
AUG -1 1955
PAUL P. O'BRIEN, CLERK

STEVENS-NESS LAW PUB. CO.

SUBJECT INDEX

	Page
Statement of the Case	1
Argument	
The Purpose of the Picketing	5
The Unlawful Purpose Theory	8
Applicability of the Taft-Hartley Act and The Norris-LaGuardian Act	14
The Picketing Was not the Proximate Cause of Appellee's Damages	16
The Class Suit and Form of Decree	17

APPENDICES

		Page
A	Compania Maritima Samsoc Limitada, Sailors' Union of the Pacific (AFL) Case No. 20-RC-809, May 1, 1950 (Administrative Decision)	i
B	American Law Inst. Restatement of Judgments, Sec. 24	iii
	American Law Inst. Restatement of Judgments, Sec. 26	i
	American Law Inst. Restatement of Judgments, Sec. 78	ii
	American Law Inst. Restatement of Judgments, Sec. 86	ii
C	29 U.S.C.A. Sec. 152 (6)	iv

INDEX OF AUTHORITIES

Table of Cases

Page

Blumauer v. Portland M.P.M.O. Union, 141 Or. 399, 17 P. 2d 115 8

Compania Maritima Samsoc, Limitada, S.A. v. Sailors' Union of the Pacific et al., No. 51565 Superior Court of San Mateo County, California ..... 15, i

Compania Naviera Hidalgo, S.A. v. Sailors' Union of the Pacific, No. 207-708 Circuit Court of Multnomah County, Oregon 11

Cuba R. Co. v. Crosby, 222 U.S. 473, 56 L. Ed. 275, 32 S. Ct. 132 13

Lonsford v. Burton, 200 Or. 497, 267 P. 2d 208 17

Matson Navigation Co. v. SIU, 100 F. Supp. 730 ..... 4, 8

Newton v. Gulf Oil Corporation, 180 Fed. 491, 493 3

Norris Grain Co. v. Seafarers International Union, 232 Minn. 91, 46 N.W. 2d 94, 26 LRRM 2597 15

Pullman Standard Car Co. v. Local Union No. 2928, 152 F. 2d 493 11

Rees v. U. S., 95 F. 2d 784 12

Sailors' Union of the Pacific, Case No. 20, R.C. 809, C.C.H. Labor Reports 1950-51, NLRB Decisions, Par. 1,081 14

Sailors' Union of the Pacific (AFL) and Moore Dry Dock Co., 92 NLRB 547, 27 LRRM 1108 15

Southern Steamship Co. v. NLRB, 316 U.S. 31, 81 L. Ed. 1246 12

The Heroe, 21 Fed. 525 3

The Jacob Luckenbach, 36 F. 2d 381 3

U. S. v. Ashton, 24 F. Cas. No. 14,470, p. 873 3

INDEX OF AUTHORITIES (Cont.)

Page

Weisthoff v. American Hawaiian Steamship Co., 79 F. 2d 124, cert. den. 296 U.S. 619 3

West v. American Telephone & Telegraph Co., 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. Ed. 139, 132 A.L.R. 956 11

Federal Statutes

29 U.S.C.A. Sec. 152 (6) .... 16, iv

Texts

20 Am. Jur., Evidence, Sec. 179, p. 184 13

41 Am. Jur., Pleading, Sec. 13, p. 296 13

American Law Institute, Restatement of Judgments, Secs. 26 and 86 .... 18, i

3 Moore, Federal Practice (2d Ed.), Sec. 23.11, p. 3465 18

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MacRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLANTS' REPLY BRIEF

Appeals from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

STATEMENT OF THE CASE

Appellee criticizes our brief for being "notably stingy in discussing the evidence" (Appellee's Br. p. 5). We will, therefore, within the available limits of this brief, discuss in more detail the facts underlying this dispute.

Although appellee pretends to set forth "a more adequate statement of the facts" its statement is entirely silent upon the facts upon which the crew members of the SS RIVIERA based their belief that the vessel was unseaworthy.

The facts were that long before the vessel reached the Port of Portland the crew members complained to the master concerning the food being served aboard the vessel and other conditions on the vessel (Tr. 75, 136, 143, 146). It was only after the vessel had been in port for six days and when it was about ready to leave (Tr. 125) that the crew members on account of the unfitness of the life-saving equipment, the food, and other conditions aboard the vessel, delivered to the master on September 9, 1952, the written document signed by a number of the members of the crew stating that they wanted to be paid off and sent home because "all that the captain promised in the past is not realized" (Tr. 138, 473).

The trial court, in the opinion which it rendered after personally inspecting the vessel, noted that it was conceded "that the beef purchased in India was lean and not of good grade", and noted that weevils were found in the cereal and rice. Also the court said that there were cockroaches on the ship (Tr. 464). The appellee's own witness, the chief steward, who did not go on strike, testified that from "a quarter to a half" of the meat when it was thawed out was not fit for human consumption and had to be thrown overboard (Tr. 190). He also stated that that which could be cooked could only be served if it were boiled (Tr. 187).

The District Court in order to find that the food was satisfactory aboard the vessel resorted to the "Scale of Provisions" set forth in the articles (Tr. 465), although it is generally recognized that such scale is "archaic" and insufficient. *Newton v. Gulf Oil Corporation* (CA-3 1950), 180 F. 2d 491, 493.

The photographs of the vessel, which are made a part of this record surely demonstrate the terrible conditions existing aboard the vessel and which conditions prompted the crew members to go on strike. The crew members were well within their rights in refusing to continue working aboard the vessel under its unseaworthy conditions. *THE JACOB LUCKENBACH* (DC ED La. 1929), 36 F. 2d 381; *THE HEROE* (DC Del. 1884), 21 Fed. 525. And even if the vessel were not technically unseaworthy, their action was justified where they had substantial grounds to believe that it was unseaworthy. *Weisthoff v. American Hawaiian Steamship Company,* 79 F. 2d 124 (CCA-2 1935), cert. denied 296 U.S. 619; *U. S. v. Ashton,* 24 F. Cas. No. 14,470, p. 873. The record abundantly supports their position.

The crew members, because of their refusal to continue working aboard the vessel, were discharged and removed from the vessel. The appellee then sought a new crew to man its vessel for the voyage to the Orient with a cargo of American grain.

Also the unions involved in these cases recognized that the low wages and inferior working conditions maintained by appellee aboard the SS RIVIERA were detrimental to their economic interests in the trade in which

the vessel was engaged. It was in this setting that the unions began picketing the vessel for the purpose of inducing the appellee to improve the working conditions aboard the vessel in order to bring it in line with the working conditions maintained on vessels upon which its members were employed.

We have not in this appeal deemed it necessary to ask this court to re-examine the correctness of the court's finding that the vessel was technically seaworthy. That issue may have been relevant with respect to the rights of the individual crew members to their wages or transportation to their ports of engagement. But after the crew members had been removed from the vessel, the question of whether their dispute with their former employer or the unions' dispute with the employer was justified or had any real basis is beside the point in determining the existence of the labor dispute. *Matson Navigation Co. v. SIU* (1951 DC Md.), 100 F. Supp. 730.

The appellee in its Statement of Facts beginning at the bottom of page 6 of its brief, attempts to mislead the court by stating that the Sailors' Union of the Pacific by means of the Makiki leaflet, induced the crew members to go on strike. Such was not the fact, but on the contrary the trial court found that the Sailors' Union of the Pacific did not induce the crew members to go on strike (Tr. 454). The American seamen who talked to the crew members before they went on strike were from the SS COTTON STATE, which was in the berth next to the SS RIVIERA. They were not members of the

Sailors' Union of the Pacific, but were members of the National Maritime Union, a union affiliated with the CIO and in competition with the Sailors' Union of the Pacific (Tr. 158, 453).

The record shows clearly that the Sailors' Union of the Pacific did not take part in the SS RIVIERA dispute until after the resolution was adopted and concurred in by the branches of the SUP on October 14, 1952, more than one month after the crew members went on strike and were discharged by the master. The picketing for which damages were awarded by the court below commenced on October 14, 1952, and during the entire period of the picketing and for more than a month previously, the former crew members were not under articles.

Also appellee's statement of facts is absolutely silent with respect to the admission and finding that all of the unions involved have an economic interest in the trade and commerce in which the SS RIVIERA was engaged (Tr. 20, 243).

ARGUMENT

The Purpose of the Picketing

The appellee insists that the purpose of the picketing by the unions was to require it to rehire the former crew members. The absurdity of this contention is apparent, since the crew members had already been off the vessel for a month. They had been jailed by the Immigration authorities and had been ordered deported and had no

desire to return to the ship (Tr. 18). They believed that the ship was unseaworthy and one of them had committed suicide (Tr. 418).

In order to substantiate its conclusion that the purpose of the picketing was to secure the rehiring of the former crew members, the appellee has referred to the testimony of William Benz (Tr. 165) and the resolution adopted by the Sailors' Union of the Pacific (Tr. 415). However, in neither Benz's testimony nor in the resolution is there found any demand for rehiring of the former crew members. On the other hand the resolution points out clearly that the appellee "is paying wages of less than one-third the amount which the American shippers are paying, and * * * is taking away business from American operated ships * * *." The resolution also, after describing the conditions aboard the SS RIVIERA stated that the appellee "is unfair to the Sailors' Union of the Pacific and other legitimate seamen's unions all over the world." The resolution called for picketing to the vessel and publicity of the dispute. There was nothing said in the resolution concerning the rehiring of the crew members. The resolution was a clear expression of the purpose of the picketing to protect the economic interests of the unions involved.

The court found that the unions had an economic interest in the trade in which the vessel was involved and that the wages paid were only about one-third the amount paid to union seamen (Tr. 243, 331, 378). Also it was admitted that 25 jobs were open for seamen aboard the vessel (Tr. 21). Furthermore, the testimony

of Jeff Morrison (Tr. 213) and M. D. MacRae (Tr. 194) and William Benz (Tr. 158) who are appellants and union representatives of the three unions involved in these cases, clearly demonstrates that the purpose of the picketing was to protect their economic interests in the trade.

The problem of foreign competition in the carriage of American cargoes is graphically illustrated by pretrial exhibit No. 83 (Tr. 474) which shows the rapid decline of charter rates on account of foreign competition.

The absurdity of the conclusion that the picketing was for the purpose of securing the rehiring of the crew members becomes even more apparent when applied to the picketing by the Master, Mates and Pilots and the SIU. Neither of these unions had any contract whatsoever with the former crew members. Appellee attempts to connect the Masters, Mates and Pilots with the picketing by the SUP by the phone calls between the union agents. Counsel for appellee adroitly lists a portion of the testimony of M. D. MacRae to prove this point but a reading of his entire testimony clearly shows that his picketing was in protection of his economic interest in the trade (Tr. 194). To connect the picketing of the SIU with the picketing of the SUP, appellee is forced to resort to the fact that the unions had the same attorneys and that Harry Lundeberg, who is the executive officer of the Sailors' Union of the Pacific, is also the executive officer of the International organization of which the Atlantic and Gulf District of the SIU is also a member. Appellee makes this bold assertion in the teeth of the

uncontradicted evidence that the Atlantic and Gulf District of the SIU is an autonomous union which is merely affiliated with the Seafarers' International Union (Tr. 215).

The Unlawful Purpose Theory

The appellee does not contend, and indeed it could not be contended, that were the picketing for the purpose of furthering the union's economic interests or for recognition of the unions by the appellee, that such picketing would not be lawful and any damages sustained thereby would be damnum absque injuria. *Blumauer v. Portland M.P.M.O. Union,* 141 Or. 399, 17 P. 2d 1115 (1933). The appellee insists, however, that the purpose of the picketing was to secure the rehiring of the crew members and that such purpose is "unlawful" since "there is no right to strike or to bargain collectively in the crew during the existence of the articles" (Appellee's Br. pp. 23-24). Or, stated in other words, the object of the picketing was unlawful because the employees involved were seamen.

If we assume for the purpose of argument that the picketing by the appellants was for the purpose of securing the rehiring of the former crew members, we contend that such picketing would nevertheless be for lawful purpose.

Before examining the cases which are relied upon by appellee and cited on page 24 of its brief, it is important to make clear a fundemental distinction between a case where crew members who are under articles neverthe-

less go on *strike*, and on the other hand a case where after a crew has been discharged and when there are vacancies in the complement of the crew, the vessel is picketed pursuant to a dispute with the union.

The cases cited by appellee on page 24 of its brief merely involve the first of the situations just described. The most that can be said for those cases is that under the American law a strike during the period of valid articles even for a legitimate labor purpose nevertheless constitutes mutiny. However, none of these cases cited by appellee covered the other situation where there is picketing by a union after a crew has been discharged and have been put off the vessel.

Throughout its brief appellee insists that the articles were still in effect, whereas clearly the crew had been discharged (Tr. 241). They had been removed from the vessel by the court at the instance of the appellee (Tr. 241). They had been jailed by the Immigration authorities and were still in custody and had been ordered deported (Tr. 18). They had filed a libel against the vessel for the collection of their wages (Tr. 19). The appellee was not attempting to operate the vessel. How, then, can it be said that the picketing complained of in these cases was unlawful because it was mutinous?

We submit that appellee's contention that the picketing involved in these cases was for an "unlawful purpose" is fully answered in Chief Judge Coleman's decision in *Matson Navigation Co. v. Seafarers' International Union,* 100 F. Supp. 730 (1951 (DC Md.). In the *Matson* case a vessel, the SS HAWAIIAN BANKER, arrived at

Baltimore, Maryland, with a full crew under articles. Its owner, the Matson Navigation Company, had a collective bargaining agreement with the Marine Engineers Beneficial Association, a CIO union, covering the wages and working conditions of the licensed engineers employed aboard the vessel. Nevertheless the vessel was picketed by the Brotherhood of Marine Engineers, an AFL union, and other AFL unions. The employer sought an injunction against the picketing in the United States District Court for the District of Maryland. It contended, as appellee contends here, that "the unlawful character of the present picketing warrants injunctive relief." The court, after a careful analysis of the Norris-La-Guardia Act, and an examination of the cases decided under it, held that although "the real purpose of the picketing was to effect a reprisal" against the CIO union, nevertheless it was pursuant to a "labor dispute" and the employer was not entitled to any relief.

We also wish to call the court's attention to the fact that the courts of the State of Oregon have ruled on the precise question presented in this appeal. Prior to filing its suit for an injunction and damages in the District Court below, appellee filed its suit for an injunction and damages in the Circuit Court of the State of Oregon for Multnomah County. Demurrers were interposed against both the complaint and the amended complaint on the ground that the controversy constituted a labor dispute and on the ground that the controversy was within the terms of the Taft-Hartley Act.

The state court (Judge Bain) in sustaining the demurrers, said:

"The court, having heard the arguments of counsel and finding that the complaint does not state facts sufficient to constitute a cause of suit, and being fully advised in the premises,

"IT IS ORDERED that the demurrer of the defendants to plaintiff's first amended complaint be and the same hereby is sustained."

Compania Naviera Hidalgo, S.A. v. Sailors' Union of the Pacific, et al., No. 207-708, Circuit Court of Multnomah County, Oregon.

Appellee then, for reasons sufficient to it, took an order of voluntary dismissal without prejudice and then filed the within cases in the District Court of Oregon.

Even if the decision of the state court is not res judicata of the cases involved here, nevertheless the decision of the state court announces the law of the State of Oregon and the federal court must follow the rule of law announced by the state court whether or not the state Supreme Court has directly passed on the question. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. Ed. 139, 132 A.L.R. 956 (1940); *Pullman Standard Car Co. v. Local Union No. 2928*, 152 F. 2d 494 (1945).

In an attempt to substantiate the holding that the picketing herein was for an "unlawful purpose," the appellee on page 27 of its brief deliberately makes the false assertion that the pay and working conditions aboard the SS RIVIERA were governed by an existing collective bargaining agreement, and thus the right to strike was extinguished during the life of the agreement.

In the first place Captain Johnson, the Master of the vessel, admitted that there was no collective bargaining agreement. He said:

> "I couldn't say whether there was a written agreement between the owners of the RIVIERA and any one of the unions with respect to what wages would or would not be paid aboard the RIVIERA. I don't know anything about it. I have been master of the RIVIERA for about two and one-half years and during all of that time I have never seen a written agreement between the owner of the RIVIERA and any British unions." (Tr. 210).

Furthermore the annotation referred to by appellee in 2 A.L.R. 2d 1278, 1281, refers to the right to strike by the union which is the party to the collective bargaining agreement. It does not refer to picketing by unions who are not parties to the agreement.

Referring again to the cases upon which the appellee relies, it is important to note that in *Rees v. U. S.*, 95 F. 2d 784, and in *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 81 L. Ed. 1246, 62 S. Ct. 886, that the courts in discussing the duty of seamen under American articles first point out that their duty is based upon the rights and protection which they receive under the *American law*. In the *Rees* case the court said:

> "The laws of the United States concerning seamen, their rights and their treatment, are more liberal and more favorable to the seamen than the laws of any other country. Great care has been taken by Congress to safeguard their rights and protect them from injustice."

However, as appellee points out in its brief on page 30, "The RIVIERA was foreign territory." Its articles

and internal operation were governed by the law of its flag, Liberia. Appellee has neither plead nor proven the Liberian law with respect to articles, desertions or mutiny. The cases relied upon by appellee all involve conduct of American seamen aboard American vessels and the courts applied the U. S. Criminal Code to find the unlawfulness of the seamen's conduct. The court is not at liberty to speculate as to what the law of Liberia might be with respect to these matters. *Cuba R. Co. v. Crosby,* 222 U.S. 473, 56 L. Ed. 275, 32 S. Ct. 132 (1912); 41 Am. Jur., Pleading, Sec. 13, p. 296; 20 Am. Jur., Evidence, Sec. 179, p. 184. Indeed, it is common knowledge that shipowners have registered their vessels in foreign countries such as Liberia in order to avoid the duties imposed by the Ameircan law.

It must be remembered that the appellee is here seeking to recover damages from the appellants for an alleged tort. The burden certainly is upon it to show clearly the basis of its cause of action. None of the cases cited by it involve either picketing or damages for picketing. They merely involve questions concerning the individual responsibility of seamen for strikes and mutiny aboard American ships. They did not touch on the questions of labor relations outside of the internal operation of the vessel during the existence of the articles. In the case at bar these questions had all been determined before the picketing complained of herein began. The crew had been discharged and removed from the vessel.

Applicability of the Taft-Hartley Act and the Norris-LaGuardia Act

In our opening brief we demonstrated that the matters and things involved in these cases were governed by the National Labor Relations Act and called the court's attention to the cases holding that the Act preempted the field. As an alternative we pointed out that should the National Labor Relations Act not be applicable, that the provisions of the Norris-LaGuardia Act should govern. In answer to this appellee contends that neither of the federal acts is applicable because "The RIVIERA was foreign territory" (p. 30 Appellee's Br.).

We can only conclude that it is appellee's contention that the American law granting it rights for either an injunction or damages is applicable to this case, but the American law safeguarding rights, privileges and immunities to laborers or labor organizations has no application to this case. In one breath appellee states "The RIVIERA was foreign territory,,' and in another breath appellee seeks damages for picketing under American law. Obviously, the appellee must predicate its right for damages upon the American law because it has not plead, nor proven, the Liberian law.

The appellee's contention that the National Labor Relations Act is not applicable without even discussing whether or not if it were applicable that the appellants' conduct would be protected, clearly indicates its admission that were the National Labor Relations Act applicable that it would have no cause of action herein. Appellee on page 30 of its brief cites *Sailors' Union of the*

Pacific, Case No. 20, R.C. 809, May 1, 1950, C.C.H. Labor Reports, 1950-51, NLRB Decisions, Par. 1,081. Appellee contends that this case holds that the National Labor Relations Board had "no jurisdiction" to determine the collective bargaining agent for a crew of a foreign vessel. The decision is brief, and we have set it out in full as Appendix A, and we submit that such is not the holding, but that the Board merely held that it would decline to exercise its jurisdiction in that case. On the other hand, in a number of cases, the National Labor Relations Act has been applied where foreign ships and foreign seamen are involved. Indeed, the National Labor Relations Board exercised its jurisdiction with respect to the picketing of the very same vessel involved in the case referred to by appellee. See *Sailors' Union of the Pacific (AFL) and Moore Dry Dock Co.,* 92 NLRB 547, 27 LRRM 1108 (1950). And in the same dispute the Superior Court of the State of California for San Mateo County refused to take jurisdiction of the suit filed by the foreign shipowner for an injunction on the ground that the Taft-Hartley Act had preempted the field. *Compania Maritima Samsoc Limitada, S.A. v. Sailors' Union of the Pacific,* et al., No. 51565.

Also in *Norris Grain Co. v. Seafarers' International Union,* 232 Minn. 91, 46 N.W. 2d 94, 26 LRRM 2597 (1950), it was held with respect to the picketing of a Canadian vessel with a Canadian crew at a Minnesota dock that the remedy under the National Labor Relations Act was exclusive.

Furthermore the definition of "commerce" in the National Labor Relations Act includes commerce with a

foreign country. 29 USCA Sec. 152(6). See Appendix C. This is in keeping with the grant of power to Congress provided for in the Federal Constitution.

We submit, therefore, as we demonstrated in our opening brief, that the federal law is applicable to this case and that appellee, who was engaged in American trade, cannot avoid its provisions because of its mixed foreign nationality.

The Picketing Was Not the Proximate Cause of Appellee's Damages

Under this heading we shall not again restate the matters with respect to the vessel being in the custody of the Marshal and the admitted fact that the vessel did not have a crew aboard it. We wish only to point out with respect to the refusal of the shore employees to work aboard the vessel that appellee's contention that "there is no evidence that there was even a contractual duty on the employers to furnish the services contracted for in the fact of a picket line" is fully answered by agreed fact No. XIII (Tr. 19) which provides as follows:

> "Employees of stevedoring and ship repair firms and other shore *employees ordered to work on the said SS RIVIERA refused to* so work while said pickets representing the Sailors' Union of the Pacific were present. Immediately after the removal of said picket line, employees of *contractors with whom plaintiff had contracted for the repair and preparation of the vessel* to carry her cargo of grain to India resumed work on said vessed as requested." (Emphasis ours).

This certainly admits the existence of contracts to repair the vessel and dispenses with the necessity of our proving such contracts. If appellee desired to show that the contracts did not require performance in the presence of a picket line, the burden was upon it to show this affirmative provision.

The nonperformance of these contracts was clearly the intervening cause of appellee's damages. The election of the contractors not to perform their work on the vessel pursuant to their contracts during the picketing was an independent intervening wrongful act.

The Class Suit and Form of Decree

The appellee in support of its contention that the judgments in these cases should run against the property of the union, refers to the recent Oregon case of *Lonsford v. Burton,* (1953) 200 Or. 497, 267 P. 2d 208. The *Lonsford* case involved a suit brought by three members of a local union "on behalf of themselves and all other members of Local 401", seeking an injunction against the International Union. The case was dismissed upon the ruling of the court that the plaintiffs did not have sufficiently identical interests so as to authorize a class suit. There is nothing in the case concerning the nature and extent of a judgment against an unincorporated association in a class suit. On page 38 of its brief appellee lifted a portion of a sentence from the *Lonsford* case in an attempt to sustain its position. The entire sentence appeared as follows: "This court has not as yet adopted the rule of the Coronado case, and despite doubts, we

shall treat the answer of the named defendant as an answer made on behalf of the International."

In the *Lonsford* case at page 507 the Oregon court pointed out that a class suit was an invention of the equity court to facilitate litigation where parties are very numerous. With respect to the judgment to be entered in a class suit the court referred to the Restatement of Judgments, Sections 26 and 86. We have set out in Appendix B the sections of the Restatement of Judgments which are applicable to judgments against associations. From these it can be readily seen that it is not possible to render a judgment against the assets of an unincorporated association without an enabling statute. The assets of an unincorporated association have the same status as the assets of a partnership. Without an enabling statute only the partners or members can be sued and the judgment can be enforced only against them. Oregon does not have an enabling statute.

The cases cited on pages 39 and 40 of appellee's brief for the proposition that an unincorporated labor organization may be sued for torts by means of a class suit were all cases decided at the threshold, that is, they were cases which came up upon a motion of the defendant to dismiss the cause at its beginning. The court merely held that the class suit could continue against the unincorporated association. None of the cited cases have held that the judgment may run against the assets of the union. The quotation from Moore on Federal Practice that "the judgement should be binding upon the association" does not find support in the cases, and no cases are cited in support of it in the text.

We submit, therefore, that should judgment be entered for damages in these cases that it should run only against the individuals served, and if the court should find that this is a true class suit, that the judgment might be res judicata upon the other members of the class for certain purposes. This is the furtherest extent to which a judgment may run in a class suit in accordance with the Restatement of Judgments.

Respectfully submitted,

TANNER & CARNEY,
K. C. TANNER,
RICHARD R. CARNEY,
Attorneys for Appellants.

APPENDIX A

Compania Maritima Samsoc Limitada, Sailors' Union of the Pacific (AFL) Case no. 20-RC-809, May 1, 1950 (Administrative Decision).

Representation Case—NLRB Jurisdiction—Foreign Vessel.

"A petition to represent employees on a vessel registered under the laws of Panama, manned by citizens of foreign countries, and owned by a Panama Corporation, the majority of whose stockholders were citizens of foreign countries, was dismissed on the ground that the internal economy of a vessel of foreign registry and ownership was involved."

APPENDIX B

American Law Inst. Restatement of Judgments

"Section 26. Representative or Class Actions.

Where a class action is properly brought by or against members of a class, the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court.

Comment:

a. A court has no jurisdiction to render a personal judgement against members of a class who are not personally subject to the jurisdiction of the court. It can,

however, make a final determination as to the issues decided in the class action which will be conclusive as to those issues not only as to the parties who are personally subject to the jurisdiction of the court but also as to those who are not so subject.

A judgment in a class action is determinative as to the issues involved, whether the judgment is in favor of or against the members of the class.

The circumstances under which a class action can properly be brought and the effects of a judgment in such an action are considered in sections 86, 116.

Section 86. Class Action.

A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action.

Section 78. Capacity to be a Party.

Any person has capacity to be a party to a judgment.

Comment:

a. Persons under incapacity. "persons" include individuals and also groups of individuals who can sue and be sued as units.

c. Associations. * * *

In States in which suit can be maintained against an unincorporated association in its business name, judgment can be rendered which is valid against the assets of the association (see section 24). Whether the judg-

ment is effective to bind personally the members of the association over whom the court has jurisdiction depends upon whether the judgment is directed against the members of merely against the assets of the organization.

Section 24. Partnerships or Other Unincorporated Associations.

A court in a State in which a partnership or other unincorporated association is subject to be sued in the firm or common name acquires by proper service of process jurisdiction over it as to causes of action arising out of business done by the association in the State.

Comment:

a. Capacity to be sued. At common law a partnership or other unincorporated association cannot be sued in its firm name or common name. In an action to enforce liabilities incurred by it, the partners or members of the association must be named individually as defendants, except where a class suit is permitted (see section 26).

By statute in a number of States it is provided that an action can be maintained against a partnership or association in its firm or common name. The Federal Rules of Civil Procedure provide in Rule 17 (b) that capacity to sue or be sued shall be determined by the law of the State in which the district court is held, except that a partnership or other unincorporated association, which has no such capacity by the law of such State, may sue or be sued in its common name for the purpose of enforcing for or against it a sustaining right existing under the Constitution or laws of the United States."

APPENDIX C

"29 U.S.C.A. Section 152. Definitions.

When used in this subchapter— * * *

(6) The term "commerce" means trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, *or between any foreign country and any State,* Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or Territory or the District of Columbia or any foreign country." (Emphasis ours).

Nos. 14,663, 14,664, 14,665

United States Court of Appeals

For the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,* vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,663
M. D. MACRAE, et al., *Appellants,* vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,664
JEFF MORRISON, et al., *Appellants,* vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,665

APPELLANTS' PETITION FOR REHEARING.

TANNER & CARNEY,
RICHARD R. CARNEY,
Pacific Building, Portland 4, Oregon,
Attorneys for Appellants and Petitioners.

FILED
MAY - 2 1956
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

I. The District Court lacked jurisdiction because of the provisions of the Labor Management Relations Act which has preempted the field of the labor controversy involved in these cases 2

II. Picketing for the purpose of requiring a shipowner to rehire seamen who had struck in violation of their articles does not constitute picketing for an unlawful purpose under the law of Oregon 10

Conclusion 12

Table of Authorities Cited

Cases

Cases	Pages
Boise Street Car Co. v. Van Avery, 61 Ida. 502, 103 P2d 1107, 2 CCH Labor Cases, 775 (1940)	11
Born v. Laube, 213 F2d 407 (CA-9 1954)	2, 3, 12
Commonwealth v. Nelson, U.S. Supreme Court, Apr. 2, 1956	3
ILWU v. Juneau Spruce Corporation, 342 U.S. 237, 72 S. Ct. 235, 96 L.Ed. 275 (1952)	10
International Brotherhood of Electrical Workers et al. v. NLRB, 341 U.S. 694, 71 S. Ct. 954 (1951)	8
NLRB v. Denver Building & Construction Trades Council et al., 341 U.S. 675, 71 S. Ct. 943 (1951)	8
United Construction Workers v. Laburnum Construction Co., 347 U.S. 656, 74 S. Ct. 833 (1954)	2, 8, 12

Statutes

Statutes	Pages
Labor Management Relations Act (29 USCA Section 141 et seq.)	2
Section 8(b)(1)(A)	8
29 USCA Section 158(b)	6
29 USCA Section 160	7
29 USCA Section 185(b)	9
29 USCA Section 187	7, 10

Nos. 14,663, 14,664, 14,665

United States Court of Appeals
For the Ninth Circuit

William Benz, et al., *Appellants*, vs. Compania Naviera Hidalgo, S.A., *Appellee*.	No. 14,663
M. D. MacRae, et al., *Appellants*, vs. Compania Naviera Hidalgo, S.A., *Appellee*.	No. 14,664
Jeff Morrison, et al., *Appellants*, vs. Compania Naviera Hidalgo, S.A., *Appellee*.	No. 14,665

APPELLANTS' PETITION FOR REHEARING.

To the Honorable Homer T. Bone, Wm. E. Orr, Circuit Judges, and to The Honorable Edward P. Murphy, District Judge, Judges of the United States Court of Appeals for the Ninth Circuit:

The appellants respectfully petition the court for a rehearing of this appeal and for a reconsideration

of parts of its decision, and in support thereof respectfully represent that the court erred in its decision that the District Court had jurisdiction to try these damage cases notwithstanding the provisions of the Labor Management Relations Act (29 USCA 141 et seq.) which has preempted the field of labor relations.

Secondly, appellants respectfully represent that the court erred in holding that the acts complained of in these cases constituted actionable torts under the law of Oregon.

I.

THE DISTRICT COURT LACKED JURISDICTION BECAUSE OF THE PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT WHICH HAS PREEMPTED THE FIELD OF THE LABOR CONTROVERSY INVOLVED IN THESE CASES.

The application by this court in the cases at bar of the rule of preemption in labor cases as laid down by the Supreme Court in *United Construction Workers v. Laburnum Construction Co.,* 347 U.S. 656, 74 S. Ct. 833 (1954), is contrary to the recent decision of this court on rehearing in *Born v. Laube,* 213 F2d 407 (CA-9 1954).

In replying to our contention that the *Laburnum* case is limited to situations involving violence, the opinion of this court stated as follows:

> "* * * Nothing in the opinion of the court in *Laburnum* suggests an acceptance of that argument, or an intent to restrict its effect to cases

of violent picketing, or other tortious means as distinguished from ends."

However in *Born v. Laube, supra,* this court said:

> "The petition for rehearing is predicated largely upon the claim that our decision is in conflict with the intervening holding of the Supreme Court in United States Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656, 34 LRRM 2229.
>
> "We have carefully considered the Laburnum decision and are of opinion that it is distinguishable inasmuch as the complaining party there, under the Labor Management Act, was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay. *Moreover, unlike Laburnum, there was no evidence or threat of violence which might serve to bring the cause within the area of the Territorial police power.*" (Emphasis ours).

Born v. Laube, supra is in keeping with the line of cases we cited in our opening brief on page 21 where the Supreme Court allowed concurrent state jurisdiction in labor cases only in furtherance of the state's police power.

The *Born* case is also in keeping with the preemption cases involving other fields of federal legislation where the Supreme Court has excluded state participation in fields covered by federal legislation except for the limited exercise of the state's police power. *Commonwealth v. Nelson,* U.S. Supreme Court, Apr. 2, 1956.

Also the opinion of the court in the instant cases stated the following:

> "The remedy in the cases before us is damages. No such remedy exists under the federal law for this fact situation. This is not a secondary boycott or a case of an award of back pay to reinstated employees where money damages may be recovered under federal law."

We submit that the foregoing quotation is erroneous because the record affirmatively demonstrates that the conduct upon which the judgment for damages herein was based is conduct which is prohibited by the Labor Management Relations Act and for which a remedy is also provided for damages under the Act.

The type of conduct found by the District Court to have been carried out by the appellants resulting in the judgments for damages against them, is stated in the Findings and Conclusions of the court as follows:

> "On or about September 15, 1952, said striking crew members of the SS RIVIERA designated the Sailors' Union of the Pacific as their collective bargaining representative. On October 14, 1952, members of the Sailors' Union of the Pacific, acting pursuant to said designations and pursuant to a resolution duly adopted by said union, commenced picketing said vessel and continued to picket it until restrained and enjoined from further picketing by this court on November 26, 1952. (Finding of Fact XI, Tr. 241.)

"Said picketing by members of the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA; and the sole purpose of said picketing by the members of the Sailors' Union of the Pacific was to compel the plaintiff to re-employ the said discharged, striking members of the crew of the said SS RIVIERA for a shorter period than that stated in the articles, and at wage rates and other conditions more favorable to them than those stated in said articles. (Finding of Fact XII, Tr. 242). (Emphasis ours.)

"Employees of stevedoring and ship repair firms and other shore employees ordered to work on the said SS RIVIERA refused to so work while said pickets representing the Sailors' Union of the Pacific were present. Immediately after the removal of said picket line, employees of contractors with whom plaintiff had contracted for the repair and preparation of the vessel to carry her cargo of grain to India resumed work on said vessel as requested. Plaintiff was unable to use its vessel for the period from October 14 through November 26, 1952, and the sole and proximate cause of such loss of use was the said picketing by defendants. (Finding of Fact XIII, Tr. 242).

"As a further proximate result of defendants' said picketing, plaintiff has suffered definite and measurable damage through loss of earnings and the expense of maintaining the SS RIVIERA and the loyal members of its crew during the period October 14, 1952, through November 26, 1952, in the total amount of $38,700.00. (Finding of Fact XVIII, Tr. 244).

> "Defendants' said picketing was the sole proximate cause of plaintiff's damages." (Conclusion IV, Tr. 245).

The foregoing quotations clearly demonstrate the District Court found that the picketing by the appellants constituted a secondary boycott, in that it was intended to prevent the repairing and loading of the SS RIVIERA by inducing and encouraging employees of independent contractors to refuse in the course of their employment to perform services on the vessel in order first to force the independent contractors to cease doing business with the appellee, and secondly to require the appellee to bargain with the Sailors' Union of the Pacific and to rehire the former crew members when the union had not been certified under the provisions of the Act.

It is clear that this conduct constituted *"unfair labor practices"* within the following provisions of said Act (29 USCA Sec. 158 (b)):

> "It shall be an unfair labor practice for a labor organization or its agents — (4) to engage in or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person. (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

been certified as the representative of such employees under the provisions of section 9."

The Act also provides a remedy for both enjoining the continuance of the unfair labor practice and for the recovery of damages caused by the conduct.

The remedy for enjoining the conduct is provided for in Title 29 USCA Section 160.

The remedy of damages and the procedure for the recovery of damages caused by the conduct constituting this unfair labor practice is provided for under the Act in Title 29 USCA Section 187 as follows:

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> (1) forcing or requiring any employer or self employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;
>
> (2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

> labor organization has been certified as the representative of such employees under the provisions of section 159 of this title. * * *
>
> "(b) Whosoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the costs of the suit."

We submit that the test established in the *Laburnum* case which allows concurrent state jurisdiction where there is "the lack of a substantially similar remedy in the federal scheme of regulation of labor disputes" has not been met in the cases at bar, because the appellee has a remedy against the unions under the provisions of the Act which we have set forth above. The Act prohibited the particular conduct involved and provided a remedy for damages. For similar secondary boycott cases see *NLRB v. Denver Building & Construction Trades Council et al,* 341 U.S. 675, 71 S.Ct. 943 (1951) and *International Brotherhood of Electrical Workers et al v. NLRB,* 341 U.S. 694, 71 S.Ct. 954 (1951).

The Supreme Court in the *Laburnum* case found that the conduct for which damages were allowed by the state court constituted an "unfair labor practice" within the provisions of Section 8 (b) (1) (A) of the Act. The court held that since the Act set up

no remedy or procedure to compensate the employer for damages which it may have sustained by the union's conduct which constituted this particular unfair labor practice, the employer could resort to the state court to recover such damages as might have been available to him under the state law.

In the cases at bar the Act provides for a remedy in damages for the "unfair labor practices" involved in these cases. The appellee, therefore, was required to bring its actions under the provisions of the Act.

The actions were not brought under the terms of the Act, but were framed under a common law theory of "picketing for an unlawful purpose" and brought as a class suit against individual members of the union. However, under the Act the remedy for damages is provided for against the union as an entity and not against individual members. (Title 29 Section 185 (b)):

> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

The Act (Title 29 USCA Section 187) declaring certain unfair labor practices to be unlawful and allowing damages therefor, and providing a remedy for the recovery of damages, establishes the remedy for the tort and impliedly such remedy is exclusive. The court was, therefore, without jurisdiction to enter judgment for the appellee for damages when the action was not brought under the Act. We submit that the judgment should be set aside and appellee's action dismissed.

This conclusion is not affected by this court's observation "that no party to any of these cases at any time had resort to the Board." Resort to the Board to first determine the existence of the unfair labor dispute is not a prerequisite to the remedy for damages under the Act. *ILWU v. Juneau Spruce Corporation,* 342 U.S. 237, 244; 72 S.Ct. 235, 239; 96 L. Ed. 275 (1952).

II.

PICKETING FOR THE PURPOSE OF REQUIRING A SHIPOWNER TO REHIRE SEAMEN WHO HAD STRUCK IN VIOLATION OF THEIR ARTICLES DOES NOT CONSTITUTE PICKETING FOR AN UNLAWFUL PURPOSE UNDER THE LAW OF OREGON.

The opinion rendered by this court in the cases at bar holding that the picketing for the purpose of requiring the appellee to rehire the seamen who went on strike was picketing for an unlawful purpose under the law of Oregon, has placed the burden upon the

appellants to show that such picketing was not tortious conduct rather than placing the burden upon the appellee to show that the conduct for which it seeks damages was tortious conduct. This court said that it could find nothing "to negative the District Court's conclusion that the picketing for the purpose of requiring a shipowner to rehire seamen who had struck in violation of their articles is picketing for an unlawful purpose under the law of Oregon."

The court assumed that the requiring of the employer to rehire the seamen was "an act which is held to be against the public policy of the state." However, neither a statute of Oregon nor a decided Oregon case has been cited which demonstrates that the rehiring of employees who were discharged for cause is against the public policy of the State of Oregon. On the contrary, it is well recognized that a lawful object of picketing by unions is for the purpose of requiring an employer to rehire employees who previously have been discharged notwithstanding the fact that the employees may have been discharged due to their own misconduct. e.g. *Boise Street Car Co. v. Van Avery,* 61 Ida. 502, 103 P2d 1107, 2 CCH Labor Cases, 775, (1940).

In our previous brief beginning on page 8 we discussed fully the lawfulness of the purpose of the picketing, even assuming that it was for the purpose of securing the rehiring of the former crew members. Surely the Federal Court should not determine for the first time the public policy of Oregon when that public policy had not been expressed by the state legis-

lature or courts, and where the appellee had been unable to cite any case allowing damages in this fact situation.

We submit that the court erred in affirming judgments for substantial damages on account of peaceful picketing. The judgments were predicated upon an "unlawful purpose" contrary to an undefined "public policy of the state."

CONCLUSION.

This court should grant a rehearing to reconsider its interpretation of the *Laburnum* case, as applied to the facts in this case. The court should also grant a rehearing in order to settle the contradiction between its holding in the instant cases and the holding in *Born v. Laube,* supra.

The court should also grant a rehearing to reexamine its affirming of the judgments for damages in excess of $50,000.00 based upon picketing in violation of an alleged public policy of Oregon which has not been shown to have been established or recognized.

Dated, Portland, Oregon,
April 27, 1956.

Respectfully submitted,
Tanner & Carney,
Richard R. Carney,
Attorneys for Appellants and Petitioners.

Certificate

I hereby certify that I am one of appellants' counsel; that I prepared the foregoing petition for rehearing, and in my judgment it is well founded. I further certify that said petition is not interposed for delay.

Dated, Portland, Oregon,
April 27, 1956.

Richard R. Carney,
Of Counsel for Appellants.

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MACRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLEE'S PETITION FOR REHEARING

Appeals from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

K C. TANNER and
RICHARD R. CARNEY,
1041 Pacific Bldg., Portland 4, Oregon,
Attorneys for Appellants.

WOOD, MATTHEISSEN, WOOD & TATUM,
JOHN D. MOSSER,
1310 Yeon Bldg., Portland 4, Oregon,

GUNTHER F. KRAUSE,
916 Portland Trust Bldg., Portland 4, Oregon,
Attroneys for Appellee.

FILE
MAY -7 1956
PAUL P. O'BRIEN, CLER

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-56

TABLE OF AUTHORITIES CITED

Page

Cases

Branson v. I. W. W., 30 Nev. 270, 95 Pac. 354 (1908) 8

Carpenters Union v. Bachman, 160 Or. 520, 86 P. (2d) 456 (1939) 5

Cousins v. Taylor, 115 Or. 472, 239 Pac. 96, 1925 5

Hawaiian Pineapple Company, Ltd. v. International Longshoremen's and Warehousemen's Union, Civil No. 5183 (U.S. D.C. Or., 1951) 6

Ketcher v. Sheet Metal Workers' International Ass'n., 115 E. Supp., 802, (E.D. Ark., W.D., 1953) 4, 12

Lonsford v. Burton, 200 Or. 497, 267 P. (2d) 208 (1953) 5

Markham and Callow v. Inter. Woodworkers, 170 Or. 517, 135 P. (2d) 727 (1943) 11

St. Germaine v. Bakery and Confectionary Workers, 97 Wash. 282, 166 Pac. 655 (1917) 7

Schwab v. Motion Picture Machine Operators, 165 Or. 602, 109 P. (2d) 727 (1943) 11

Stentor Electric Mfg. Co. v. Claxon Co., 125 F. (2d) 820 (1942, CCA 3) 6

Tisa v. Potofsky, 90 F. Supp. 175 (S.D. N.Y., (1950) 12

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F. (2d) 403 (1945, CCA 4); 163 F. (2d) 289 (1947, CCA 4) 8

United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922) 4

TABLE OF AUTHORITIES CITED
(Continued)

Page

Rules and Statutes

47 C. J., Partnership § 554 9

Rule 17, F. R. C. P. 8

ORS 13.170 (formerly OCLA § 9-106) 8

ORS Chapters 661 and 662 (formerly OCLA Chapter 102) 10

ORS 661.010 10

ORS 661.210 through 661.280 10

ORS 661.040 10

ORS 662.070 (formerly OCLA 102-915) 10

Nos. 14663-14664-14665

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM BENZ, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

M. D. MacRAE, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

JEFF MORRISON, et al., *Appellants,*

vs.

COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*

APPELLEE'S PETITION FOR REHEARING

Appeals from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

To The Honorable HOMER T. BONE and WM. E. ORR, Circuit Judges, and the Honorable EDWARD P. MURPHY, District Judge, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellee respectfully petitions the court for a rehearing of this appeal and for a reconsideration of the

modification made by it in the judgments of the District Court for Oregon. Appellee respectfully submits that the court failed to consider applicable common law rules and statutes of the State of Oregon in holding that the assets of a labor union may not be reached under Oregon law by one who has been wronged by the union.

QUESTION PRESENTED

In modifying the judgment of the District Court for Oregon in this case, the Court of Appeals has placed beyond the reach of an injured party all property and moneys of labor unions and unincorporated associations in Oregon. This court in modifying the judgment held that under the law of Oregon a labor organization cannot be sued as an entity and, even though judgment is obtained against all of its members as a class, the judgment cannot be enforced against the property of the labor organization. We cannot believe that this court intended such a radical departure from long-established principles of law.

In each of these cases the District Court rendered a final decree awarding appellee damages against certain individual union members who had been served, each member of the union (those served being found to be proper representatives of all) and the union itself. The District Court further decreed that execution issue against the individual property of the individuals served and against any property held by the union or for the use and benefit of the members of the union, whether

held in the name of the association or by others for it, but denied execution against the individual property of any member not served.

This court sustained the award of damages against the individuals served and each member of the unions, likewise finding proper representation of all; but reversed the judgment against the unions. Likewise, this court affirmed execution against the individual property of those served but denied execution against property held by the unions and for the collective use and benefit of their members.

This case was decided under Oregon law, which concededly governs to the extent jurisdiction is based on diversity. The question thus presented is: Does the law of Oregon require that one who has been injured by a union may not recover judgment against that union and collect the damages it has suffered from the assets of the Union, even though millions, but rather must seek such damages where it may find them among the individual assets of the union's members, however small?

I. The Oregon Courts have never had to determine whether an unincorporated Labor Union and its collective assets may be held for its torts. That question is presented in these cases from the Oregon District Court, based on diversity of citizenship, and this Court must determine it in the light of all pertinent data, including Oregon Statutes and cases from other jurisdictions.

In reversing the District Court's negative answer to the question presented, this Court relied upon the fact that the Oregon Courts have never affirmatively adopted the rule of the CORONADO case, *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1922), and that the legislature of Oregon has never specifically provided that a labor union may be sued as an entity. We concede that. But that is not the question. No attempt was made here to sue the union as an entity in its name. The case is based on diversity of citizenship and, even where an association is recognized as an entity suable in its name, it has no citizenship for purposes of diversity other than that of its members. The suits here are class suits brought against proper representatives of all of the members of each of the unions involved. The determinative citizenship is that of these representatives. See, e.g. *Ketcher v. Sheet Metal Workers' International Ass'n.,* 115 F. Supp, 802, at 811 (E.D. Ark., W.D., 1953).

We emphasize that it was for the purposes of diversity and not because of any doubt that unions are suable as entities in Oregon that the class suit was adopted in these cases. The Supreme Court of Oregon

has never held that an unincorporated labor union may not be sued as an entity in its own name. *Cousins v. Taylor,* 115 Oregon 472, 239 Pac. 96, 1925, was not an action against an association in its name. The language in that case to the effect that associations may not be sued as entities is dictum. Moreover, in its opinion the Supreme Court emphasized,

> "* * * * * * since this association was not a legal entity and there is no statute in this state authorizing such an organization, or defining the duties, powers and liabilities of the members of such an association when voluntarily formed, the association could neither sue nor be sued, and as such it had no capacity to enter into a contract or to appoint an agent for any purpose. Therefore a contract entered into in the name of the association or in its behalf, by any of the officers or members of the association would not be binding upon the association or enforceable against it." (115 Or. at 476)

This is not the case with unincorporated labor unions, which, as we shall point out, are specifically authorized by Oregon statute. Furthermore the Oregon Supreme Court has specifically recognized the contractual powers of an unincorporated union, *Carpenters Union v. Bachman,* 160 Ore. 520, 86 P. (2d) 456 (1939). In the only Oregon Supreme Court case to even mention the question of the suability of labor unions as entities, *Lonsford v. Burton,* 200 Ore. 497, 267 P. (2d) 208 (1953), the Supreme Court of Oregon specifically reserved and did not pass on that question.

We submit that were that question today presented to the Oregon courts, they would hold such unions

suable as entities. Indeed, the Honorable James Alger Fee, while Chief Judge of the United States District Court for Oregon, specifically so held in a diversity case, *Hawaiian Pineapple Company, Ltd. v. International Longshoremen's and Warehousemen's Union,* Civil No. 5183 (1951).

It is unnecessary, however, for the Court here to decide whether unions may be so sued. The question is whether judgment may be had against them and their collective assets reached and held for the wrongs committed by them where jurisdiction over the union is obtained in a class suit or action. In determining what the Oregon courts would hold in that respect, there being no opinion of the Supreme Court of the State of Oregon on that question, the Federal Courts in a diversity case should look to all pertinent data, including cases from other jurisdictions and Oregon statutes, *Stentor Electric Mfg. Co. v. Claxon Co.,* 125 F. (2d) 820 (1942, CCA 3).

II. An unincorporated Labor Union and its collective assets are liable for its torts even in those jurisdictions where it may not sue or be sued in its collective name, so long as all its members have been properly joined as defendants in a class suit or action, as they were here.

Long prior to the adoption of the *Coronado* rule and in the absence of any statute, courts held that a union's assets might be reached in a suit or action for damages brought against it by serving individuals as representatives of all its members.

In *St. Germaine v. Bakery and Confectionary Workers,* 97 Wash. 282, 166 Pac. 655 (1917) the Supreme Court of Washington specifically reached that conclusion. As in these cases, the suit there was for an injunction and damages for wrongful picketing. The specific question here involved was decided by that court as follows:

> "In the decree, the costs were awarded against certain of the respondents, but not against the unions, which were really the instigators, and controlled the picketing and caused the damage in the case. It is argued by the respondents that costs cannot be awarded against the unions, because the unions are not incorporated bodies, but are mere voluntary associations. It is alleged in the complaint that these unions are voluntary organizations, that the membership thereof is in the neighborhood of 500, and is so large that it is impracticable to bring all the members thereof before the court, and the officers, therefore, only, are made parties, without bringing all of the members of the unions before the court. In the case of Branson v. Industrial Workers of the World, 30 Nev. 270, 95 Pac. 354, a Nevada case, it was held that, in an action in equity against a voluntary unincorporated organization, where the members comprising the same were numerous, such organizations might be made parties to an action, where a few of the members thereof were made defendants for the purpose of representing the organization, and, in that case, it was held proper to enter judgment against the organization as well as against the individual parties who were named as defendants in the case. That case is a learned discussion of the question, and, we think, is conclusive. It became the duty of the court, therefore, to enter a judgment for damages and costs against all of the respondents." (166 Pac. at 669).

In the even earlier case of *Branson v. I. W. W.*, 30 Nev. 270, 95 Pac. 354 (1908), referred to in the above quotation, the Supreme Court of Nevada upheld an attachment against union assets in a class action. The court there specifically recognized that voluntary unincorporated associations could not sue or be sued in their names alone; but recognized that they could sue or be sued by joining in all of their members, either in fact or through a class proceeding against proper representatives. It was argued in that case that the class suit could not be applied to an action for damages. The court held that a Nevada statute providing for the class procedure in a code which abolished the common law forms of action made such procedure applicable to actions at law as well as suits in equity. Oregon has such a code and such a specific provision for class proceedings. See ORS 13.170 (formerly OCLA § 9-106), quoted in appellee's prior brief at page 38.

Finally we again call the Court's attention to *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 148 F. (2d) 403 (1945, CCA 4); 163 F. (2d) 289 (1947, CCA 4). In its opinion, the Court distinguished that case as coming within Rule 17, F.R.C.P. and the *Coronado* rule, because of a Federal question involved. We emphasize again that that case was not a suit against a union as an entity. The Court specifically held that service on the union as an entity was not adequate; but affirmed the recovery of damages against the union on the basis of a class suit.

All of these cases simply recognize that an unincorporated labor union is nothing more than the sum of

its members. It is semantics not substance to consider the class name as something apart from the class. Where it is proper to enter judgment against every member of the union after a finding that those sued are proper representatives of all and that the wrong was committed by all, it cannot be the law that judgment may not be had against the union and made collectible out of its assets. In this connection, it should be noted that the courts, independent of statute, long ago held firm assets liable on a judgment against members of a partnership, although partnerships could not be sued as entities, but only by joining all of the members as parties.

Thus, in 47 C.J., Partnership § 554, at page 1013, we find:

> "At common law a judgment against the members of a firm for a firm debt is binding on the partnership property and also on each partner's individual property."

Surely there is no reason to apply a different rule to an unincorporated labor organization. Like a partnership, it is formed to promote the economic well-being of its members. Even more than a partnership in the modern community, it may accumulate vast assets and wield tremendous power. When that power is brought to bear to the damage of an innocent party, surely the assets which contribute to the power should be available for compensation of the wrong.

III. Oregon Statutes declare unincorporated Labor Unions legal, specifically regulate their property rights and recognize that they may be held liable in damages.

Apart from common law and common sense reasons for making the assets of a union available to those wronged by it, a reading of the Oregon Statutes indicates a legislative intent to provide such liability. Chapters 661 and 662 ORS (formerly OCLA Chapter 102) contain many provisions dealing with labor unions. Their legality is recognized, ORS 661.010. The property rights of unincorporated organizations and associations in the labor field are specifically regulated by ORS 661.040, which requires such organizations and associations to keep books of all their receipts and expenditures and to be accountable to their members. The right to the union label is set forth and a right of damages for infringement given the union, ORS 661.210 through 661.280.

Even more significant, the Oregon Code specifically recognizes the liability of such associations. ORS 662.-070 (formerly OCLA 102-915) provides as follows:

> "**Liability of associations and officers and members of associations for unlawful acts of individuals.** No officer or member of any association or organization *and no association or organization* participating or interested in a labor dispute, shall be held responsible or liable in any court of this state for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis added).

This provision is contained in the Oregon Little Norris-LaGuardia Act. It is, however, not confined to injunctions, but deals with liability. It clearly recognizes that a labor association may have a liability apart from the individual liabilities of its members, under circumstances found in this case both by this Court and that below.

IV. Under either Federal Maritime Law, which we think applicable, or the Taft-Hartley Law, which appellants argue applies, appellee is entitled to judgments against the Unions, enforceable against their collective assets.

As the Court found, the picketing of appellants was clearly unlawful under Oregon law, (*Schwab v. Moving Picture Machine Operators,* 165 Ore. 602, 109 P. 2d 600 (1941) (Discussed in our prior brief, at pp. 24-28); *Markham and Callow v. Inter. Woodworkers,* 170 Ore. 517, 135 P. (2d) 727 (1943) (Picketing to force rehire of employees discharged for violation of contractual obligation held unlawful, 170 Or. at 575).

So far we have discussed the case on the theory on which it was decided. We should point briefly to the other theories advanced by the parties.

In its decision the Court ignored appellee's principal argument (see Appellee's Brief, particularly at pages 27-29) that the conduct of the unions was for a purpose also declared unlawful by Federal Maritime law. Even if the court were correct in holding a federal question necessary to a judgment against a union sued by class procedure, as in its interpretation of the *Turnstall* case,

supra, such a question was here involved by violation of these maritime rights of appellee.

Finally, should appellants be correct in their argument that appellee pleaded and proved a case under the Taft-Hartley Act, judgment against the unions would be proper. That the right granted by the Taft-Hartley to sue unions as entities did not abolish the right to sue them by class action, see *Tisa v. Potofsky,* 90 F. Supp. 175 (S.D. N.Y., 1950); *Ketcher v. Sheet Metal Workers,* supra.

CONCLUSION

We respectfully submit that the Court erred in holding that judgment may not be entered against an unincorporated labor union and that its collective assets may not be reached by one who has been damaged, as here, by the actions of the union, deliberately taken and fully authorized by the membership. Nothing in equity, which is the source of the class proceeding here used, supports this monstrous result, which deprives the one wronged of any remedy or forces him to seek it in an unequal and inequitable manner against the assets of a few of the many who participated in the wrong. Nor does anything in Oregon law support such an unrealistic result. Common sense forbids it.

We respectfully pray that the Court withdraw its modification of the judgments entered in these cases by

the District Court for the State of Oregon, which should in all respects be affirmed.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD & TATUM,
JOHN D. MOSSER,
GUNTHER F. KRAUSE,
Attorneys for Appellee.

CERTIFICATE

I hereby certify that I am one of counsel for appellee; that I prepared the foregoing petition for rehearing, and in my judgment it is well founded. I further certify that said petition is not interposed for delay.

Dated at Portland, Oregon, May 1, 1956.

JOHN D. MOSSER
of Counsel for Appellee

No. 14667

United States Court of Appeals

for the Ninth Circuit

RUTH WHITEHEAD, Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of Ned Whitehead, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —8-8-55

No. 14667

United States Court of Appeals

for the Ninth Circuit

RUTH WHITEHEAD, Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of Ned Whitehead, bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on 41

Designation of Record on 43

Notice of 40

Certificate of Clerk to Transcript of Record.... 41

Certificate on Review 33

Designation of Record on Appeal.... 43

Memorandum of Points and Authorities in Support of Petition for Review of Order of Referee, Appellant's 37

Names and Addresses of Attorneys.... 1

Notice of Appeal 40

Order on Review of Referee's Order of August 16, 1954 39

Order re Confirmation of Sale.... 18

Order to Levy Execution Upon Assets in Possession or Under Control of Trustee.... 5

Order to Show Cause re Vacating and Setting Aside Order dated Oct. 8, 1953, Permitting Levy of Execution on Trustee................ 25

Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution 26

Petition for Confirmation and Authority to Enter into Contract and Agreement attached.... 6

Petition for Order to Levy Execution Upon Assets in Possession of Trustee, and Order... 3

Petition for Order to Show Cause re Release of Writ of Execution 22

Petition for Review of Order of Referee....... 28

Petition to Compromise 19

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

A. A. GOLDSTONE,

756 South Broadway,
Los Angeles 14, California.

For Appellee:

QUITTNER AND STUTMAN; and
GEORGE M. TREISTER,

639 South Spring Street,
Los Angeles 14, California. [1*]

---

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy No. 55507-WM

In the Matter of NED WHITEHEAD, d/b/a WHITEHEAD & CO., Bankrupt.

PETITION FOR ORDER TO LEVY EXECUTION UPON ASSETS IN POSSESSION OF TRUSTEE AND ORDER

The petition of Ruth Whitehead respectfully represents:

I.

That your petitioner is the former wife of Ned Whitehead, the above-named bankrupt, and that petitioner and said Ned Whitehead have one minor child, Wendy Gay Whitehead.

II.

That petitioner obtained a final judgment of divorce from said above-named bankrupt, Ned Whitehead, being case No. D-382949 in the Superior Court of the State of California in and for the County of Los Angeles; that said divorce became final on or about July 25, 1951.

III.

That said judgment of divorce awarded the custody of said minor child to petitioner and provided that the defendant pay to petitioner for the support of said minor child the sum of $150.00 per month on the 15th day of each month; that said

order for the [7] support of said minor is still in full force and effect; that there is accrued and unpaid under said judgment for the support of said minor child the sum of $2,250.00; and that there is due, owing, and unpaid from said Ned Whitehead to petitioner for the support of said minor child the sum of $2,250.00 from July 15, 1952 to and including September 15, 1953.

IV.

That said judgment of divorce of said Superior Court also provided that said above-named bankrupt, Ned Whitehead, pay to petitioner for her support and maintenance the sum of $250.00 per month, on the 15th day of each month, commencing June 15, 1952; that said order is still in full force and effect; that there is accrued and unpaid under said judgment for the support of petitioner the sum of $3,750.00; and that there is due, owing, and unpaid from said Ned Whitehead to petitioner for the support of petitioner the sum of $3,750.00 from July 15, 1952 to and including September 15, 1953.

V.

That there are assets of said above-named bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, the duly appointed trustee of the said bankrupt, including shares of stock in Whitehead & Co., and that petitioner is informed and believes, and therefore avers that there will be a surplus of such assets after payment or adjustment of the claims of creditors in

the above-entitled matter, and that said surplus of assets is available for payment of the sums due, owing, and unpaid from said bankrupt, Ned Whitehead, to petitioner under said judgment of divorce.

Wherefore, your petitioner prays for an order authorizing and permitting petitioner to levy execution or garnishment upon said trustee and upon all the assets of the bankrupt herein in the possession of said trustee, and that the surplus of said assets in excess of that required for payment to creditors of the bankrupt [8] herein and the costs of administration herein be held to be subject to and be used for the payment of the sums due petitioner from the bankrupt, as hereinabove set forth, namely the total sum of $6,000.00.

Dated this 8 day of October, 1953.

/s/ RUTH WHITEHEAD,
Petitioner [9]

Duly Verified. [11]

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

ORDER TO LEVY EXECUTION UPON ASSETS IN POSSESSION OR UNDER CONTROL OF TRUSTEE

Upon the filing and reading of the above and foregoing petition of Ruth Whitehead, and good cause appearing therefor, it is hereby

Ordered that said petitioner, Ruth Whitehead, be and she is hereby authorized and permitted to levy execution and/or garnishment upon all of the assets of the hereinabove named bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, trustee in the above-entitled matter, including the stock of Whitehead & Co., in the possession of said trustee, provided, however, that said assets shall be first applied to the payment and satisfaction of the allowed claims of creditors herein and costs of administration herein, the surplus of said assets in excess of said approved and allowed creditors' claims and expenses of administration to be applied toward payment of said sums due said Ruth Whitehead.

Dated this 8 day of October, 1953.

/s/ REUBEN G. HUNT,
Referee [10]

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

PETITION FOR CONFIRMATION AND AUTHORITY TO ENTER INTO CONTRACT

The petition of A. S. Menick, respectfully shows:

I.

That he is the duly appointed, qualified and acting Trustee in the above-entitled matter.

II.

That your petitioner has taken over all of the known assets of the above-entitled bankrupt, including 378 shares of stock in Whitehead & Co., Inc., a Puerto Rican concern. In addition, there remains undisposed of, a small inventory of tools and parts, an equity in an automobile and certain possible patentable ideas.

III.

That the bankrupt herein is presently employed by Whitehead & Co., Inc. in Puerto Rico and has offered to purchase the remaining assets of this estate for the sum of $13,500.00, and has offered to execute, in connection with said purchase an agreement, a true copy of which agreement is attached to this petition. [12]

IV.

Your petitioner alleges that if the remaining assets of this estate were sold at public auction, they would not bring into this estate the sum of $13,500.00 and that it would be for the best interest of this estate and the creditors herein if this private sale to Ned Whitehead for the consideration of $13,500.00 be confirmed by this Court. In connection with this sale, your petitioner desires to become a party to the attached agreement for the further protection and benefit of this estate.

Wherefore, your petitioner prays that upon reading and filing of this verified petition, that this Court set a time and place for hearing and that a 10-day notice thereof be sent to all creditors herein,

and that upon approval of this petition by the Court and the creditors, that an order be made confirming the sale to Ned Whitehead of the remaining assets of this estate in the sum of $13,-500.00, subject to the terms and conditions of the agreement attached to this petition and that a further order be made authorizing and directing your petitioner to become a party to the said agreement and to execute any and all other documents necessary to carry out the terms thereof.

/s/ A. S. MENICK,
Petitioner
QUITTNER AND STUTMAN,
/s/ By WILLIAM J. TIERNAN [13]

AGREEMENT

Agreement made on this....day of........, 1953, at Los Angeles, California, between Ned Whitehead, presiding at San Juan, Puerto Rico, hereinafter referred to as the "Pledgor", and Alfred S. Menick, residing at.................., California, Trustee in Bankruptcy in the proceedings pending in the United States District Court, Southern District of California, Central Division, entitled "Ned Whitehead, doing business as Whitehead & Company, bankrupt, No. 55507-WM," hereinafter referred to as the "Trustee."

Witnesseth:

Whereas, the Trustee has on this day sold and the Pledgor has purchased the following assets belonging to the estate of the bankrupt in the proceeding mentioned above:

(1) 378 shares of the capital stock of Whitehead & Co., Inc.

(2) Equity in 1950 Oldsmobile Convertible 98.

(3) Equity in certain conditional contract of sale, involving sale by American Type Founders, Inc., to the bankrupt of One—Chief 22, 17½ x 22½ Offset Press, complete with standard equipment—220 volt, 60 cycle, 3 phase AC motor—Serial No. 3943, UCR No. 35-1713. Said contract dated August 29, 1952. In this connection, while the contract is made in the name of Whitehead, the Bankrupt, substantial down payments have been made by the Puerto Rico corporation.

(4) A small amount of inventory in possession of the Trustee, consisting generally of small electrical parts and hand tools. (See Exhibit A, attached.)

(5) Certain unapplied for patent ideas.

The foregoing enumeration is meant to be general, only. It is the separate purpose and intent of this agreement to convey to Ned Whitehead in exchange for the considerations herein stated all of the remaining known assets of the bankrupt estate in the possession of the Trustee, with the exception of accounts receivable and cash, already in the possession of the Trustee.

Whereas, the Pledgor has delivered to the Trustee in full payment for the sale and transfer of the assets listed above, a promissory note of even date for a total of $13,500.00 of principal, payable in installments on the first day of each month, starting the 1st day of September 1953, in equal payments of $750.00 in principal and bearing interest at the

rate of 6% on and after maturity of each instalment if not paid on said due date.

Whereas, the parties to this agreement have agreed, as one of the conditions of the sale by the Trustee to the Pledgor that the said 378 shares of capital stock of Whitehead and Co., Inc., a Puerto Rico corporation, shall be re-assigned, transferred and re-delivered to the Trustee, in pledge, to secure the payment of principal and interest of the above mentioned note, according to the terms thereof, and to secure the performance of each and every condition and convenant of this sale and pledge agreement.

Now, Therefore, It Is Mutually Agreed, as follows:

1. The Pledgor, hereby assigns, transfers and delivers to the Trustee and his successor or successors all right, title and interest in and to said 378 shares of stock of Whitehead & Co., Inc., to have and to hold said shares of capital stock to his own use and behoof, forever, but subject to the terms and conditions of this agreement. [15]

2. The Pledgor shall have the right to vote said stock and to receive any dividends or distributions declared or issued thereon so long as the terms and conditions of this agreement are fulfilled.

3. The Pledgor convenants and agrees that as long as the note above mentioned plus accrued interest remain unpaid he will not vote the shares of capital stock herein pledged, or any of them, for the following purposes:

(a) To mortgage the property of Whitehead &

Co., Inc., except for a full and adequate consideration, or

(b) To sell the property of Whitehead & Co., Inc., other than in the usual course of business, or

(c) To consolidate, merge or dissolve Whitehead & Co., Inc., or

(d) To otherwise prejudice the value of the shares herein pledged by transactions affecting or involving the capital stock or the assets of Whitehead & Co., Inc.

4. The Pledgor agrees that, so long as said note shall remain unpaid: Whitehead & Co., Inc., will not assign, transfer, mortgage, hypothecate, or pledge its property, or any substantial part thereof, without a full and adequate consideration, and shall at all times comply with all acts, laws, rules, regulations and orders of any insular or federal legislative, executive, administrative or judicial body, commissioner or officer exercising any power of regulation or supervision over Whitehead & Co., Inc., or over any part of any of its assets.

5. The Pledgor agrees to pay all taxes, assessments and Government charges lawfully imposed on the shares pledged herein or the assets of Whitehead & Co., Inc., to the prejudice of the shares herein pledged.

6. The Pledgor agrees that any dividends or distributions received by him in respect to the shares herein pledged shall be first applied to the payment of the principal and interest of the aforementioned note. [16]

7. In the event any one or more of the following

should happen, the Trustee may declare the principal of all said note then outstanding, even though not then due and payable, to be immediately due and payable and said note on such declaration shall become immediately due and payable:

(a) Failure to pay any installment of said note within 30 days after said installment becomes due and payable.

(b) Failure to perform the conditions contained in Sections 3 and 4 of this agreement.

(c) If Whitehead & Co., Inc., should become insolvent or should file a petition in bankruptcy or if a petition in bankruptcy should be filed against Whitehead & Co., Inc., or if a petition for reorganization should be filed on behalf of or against Whitehead & Co., Inc., or if a petition for extension, composition, or an arrangement under the National Bankruptcy Act should be filed on behalf of a or against Whitehead Co., Inc., or should the said corporation be subject to any proceedings under any insolvency law or should make general assignments for the benefit of creditors or if a receiver of the property of the said corporation should be named or if any sequestration proceeding be brought against Whitehead & Co., Inc., or if any proceedings be begun to dissolve or liquidate Whitehead & Co., Inc., or if any judgment for the transfer or delivery of a substantial portion of its property be entered against Whitehead & Co., Inc.

8. The Pledgor agrees that during the duration of this agreement his withdrawals from Whitehead & Co., Inc., other than salary, shall be limited as follows:

(a) No sum in excess of $1,000 a month plus actual transportation costs shall be expended for travel and entertainment expenses away from Puerto Rico, without the consent of the Trustee;

(b) No sum in excess of $500 per month shall be expended as subsistence allowance while the Pledgor remains in Puerto Rico. [17]

9. The Trustee may upon the failure of the Pledgor duly and punctually to pay the debt represented by the note herein mentioned or any part thereof, as and when due, as provided herein, or as provided by said note, immediately, without demand for payment, without publication, but upon 30 days notice by regular mail to the Pledgor, sell any or all of said shares herein pledged at any broker's board, or at public or private sale and apply the proceeds of such sales as far as needed toward the payment of the whole of the said indebtedness together with the interest thereon and the expenses of sale; and the Pledgor shall remain responsible for any deficiency remaining unpaid after such application; and it is expressly understood and agreed that the Trustee may himself be a purchaser at any such sale of the whole, or any part, of said shares of capital stock sold, free of any right, or equity of redemption, such right or equity of redemption being hereby expressly waived and released.

10. (a) No right or remedy conferred herein shall be deemed to exclude any other right or remedy herein conferred or existing at law or equity.

(b) No delay or omission by the Trustee to exercise any remedy or right accruing upon any de-

fault shall impair such right or remedy or be construed to be a waiver of any such default, or an acquiescence therein, nor shall it affect any subsequent default of the same, or of a different nature.

11. The Trustee expressly agrees that if the sum of $13,500.00, together with other moneys in the possession of the Trustee is more than enough to pay the expenses of administration and all the claims of creditors allowed and allowable in the bankruptcy proceedings, previously mentioned, including secured and unsecured and tax claims, then and in that event, such excess shall be rebated to Ned Whitehead and shall be credited on said promissory note.

12. As a part of this agreement of sale and pledge, the Trustee agrees to and does herewith release Mr. Ned Whitehead and Whitehead & Co., Inc. of any and all causes of actions he may have [18] against either or both of them.

13. The parties to this agreement expressly agree that any uncollected accounts receivable already collected or due the bankrupt, are to remain the property of the Trustee and the Pledgor agrees to forward to and deliver to the Trustee any and all funds collected by Ned Whitehead or Whitehead & Co., Inc. on behalf of the bankrupt.

....

Trustee

....

Ned Whitehead [19]

EXHIBIT "A"

In the Matter of Ned Whitehead dba Whitehead Company

Page 1 & 2	Tools	$ 413.50
Page 3 & 4	Supplies	326.62
Page 5	Supplies Purchased for Selector Inc.	194.38
Page 6	Office Equipment	75.00
		$1,009.50

Assets located in Garage at 1633 So. Orange Dr., Los Angeles, Calif.

A. S. Menick, Trustee, 420 H. W. Hellman Bldg., 354 So. Spring St., Los Angeles, Calif. Phone MI 5547

Inventory Taken 3/1 and 3/14 by A. G. Imig

Tools

T	1	1-Corner Rounder No. 11615........$	5.00
	2	1-1 Hole Paper Punch..............	1.00
	3	3-Misc. Clamps	2.00
	4	1-Paper Cutter	1.00
	5	1-Pressure & Release Press No. 59...	20.00
	6	1-Water Cooled Die	2.00
	7	2-Pr. Tin Snips Wiss#M-1.....1.25	2.50
	8	1-Bearing Puller, Plumb No. 4021...	2.50
	9	1-Dumore Bench Drill Press No. X93828	25.00
	10	1-A.C. Ampmerter	2.50
	11	21-Misc. Punch Dies	3.00
	12	1 G.E. D.C. Kilovolt Test Meter.....	25.00

13	3-Beard Expanding Reamers	3.00	9.00
14	25-Misc. Reamers	2.00	50.00
15	18-Misc. Taps	2.00	36.00
16	5-Misc. Drills (countersinks)	3.00	15.00
17	70-Misc. Drills various size	1.00	70.00
18	1-Drill Press Vise		3.00
19	1-5/16" Thor Elect. Drill No. 488423 w/Jacobs Chuck		35.00
20	2-Sets 5/32" Steel number dies	12.00	24.00
21	1-Set 3/16" Steel Letter Dies		20.00
22	1-Set 5/32" Steel Letter Die		20.00
Page 1			$373.50

Tools

T 23	1-Set 1/2" Steel Number Die		20.00
24	1-Set 1/8" Steel Number Die		12.00
25	1-1/8" to 2" Reamer		5.00
26	1-lot 1/4" Grinding Wheels		3.00
Page 2			40.00

Supplies

S 1	13-Partial Rolls Misc. Wire		$ 20.00
2	2-Wired Selector Panels, as is	5.00	10.00
3	2-Partial Wired Experimental Test Panels	5.00	10.00
4	4-Boxes Misc. Elect. Parts		5.00
5	1-Box ¾" x 12" Insulating Strips		1.00
6	261-Plugs and Receptacles	.03	8.07
7	1-Sarkes Tarzian No. 7N26261BBS Condenser		3.00
8	5-Misc. Used Transformers	1.00	5.00
9	2-Western Elect. Transformers, Used	2.00	4.00

10	2-Jeffries Elect. Transformers, No. 88288 & 86	3.00	6.00
11	1-G.E. Elect. Transformers 9TD1224E1		2.95
12	1-Cramer Timer No. 46948-E		5.00
13	24-Misc. Brass & Alum. Angles		1.50
14	35-Telephone Relays No. 13034-1	2.25	78.75
15	185-Misc. Relays (New & Used)	.50	92.50
16	138-NE-2 Neon Bulbs	.05	6.90
17	925-G.E. Welded Germanium Diode K1135478-18	.03	27.75
18	85-Sangamo 01-600 Resistors	.02	1.70
19	1-Lot Soldering Tips		2.00
20	100-Misc. Jacks & Plugs		3.00
21	4-Amperite Delay Relay Tubes No. 11562	.75	3.00
22	5-Selector Plugs	.50	3.00
23	250-Nickel Plated Plug connections	.01	2.50
Page 3			302.12

Supplies

S 24	16 sq. ft. 1/4″ Bakelite		10.00
25	30-Mercoid Covers	.15	4.50
26	1-Lot Misc. Allen Head Bolts		10.00
Page 4			24.50

Supplies—Selector, Inc.

S 1	50-No. P-3 Relays 800 ohm	1.38	69.00
2	24-No. 221 Relays 235 ohm	1.38	33.12
3	9-No. 229 Relays 500 ohm	1.38	12.42
4	4-No. 224 Relays 500 ohm	1.38	5.52
5	4-No. 224A Relays 1000 ohm	1.38	5.52
6	4-No. 1P42RCA Tubes	7.50	30.00

7	1-No. 12AU7GE Tubes		4.00
8	70-Toggle Switches	.24	16.80
9	1-Sound Recording Tape		1.00
10	3-Rolls Music Wire	3.00	9.00
11	1-Lot Drill Patterns		5.00
12	6 ft. 3/8" Brass Rod, square		3.00
			194.38

Page 5

Office Equipment

1 Underwood Typewriter No. 3959262.......$75.00

Located at Office of A. S. Menick, Trustee, 354 So. Spring St., Los Angeles, Calif. [26]

Page 6

Duly Verified. [27]

[Endorsed]: Filed May 13, 1953.

[Title of District Court and Cause.]

ORDER RE CONFIRMATION OF SALE

This matter came on to be heard before the undersigned Referee in Bankruptcy in his courtroom in the Federal Building, Temple and Spring Streets, Los Angeles, California, upon the verified Petition for Confirmation of private sale and for authority to enter into a contract filed by the Trustee herein. The Trustee appeared through his attorneys, Quittner and Stutman (William J. Tiernan of counsel). No one appeared in opposition to the said Petition and the Court finds due notice to creditors and parties in interest has been given; it is therefore

Ordered, that the Petition of the Trustee be and it hereby is granted; it is

Further Ordered that the sale of the remaining assets of this estate as set forth in the aforesaid Petition be and it hereby is confirmed to Ned Whitehead; it is

Further Ordered that the Trustee be and he hereby is authorized and directed to execute the agreement, a copy of which is attached to the verified Petition, and the Trustee is further ordered to execute any and all documents necessary to carry out the terms of the aforesaid agreement.

Dated: This 1st day of June, 1953.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [28]

[Endorsed]: Filed June 1, 1953.

[Title of District Court and Cause.]

PETITION TO COMPROMISE

The petition of A. S. Menick, respectfully shows:

I.

That he is the duly appointed, qualified and acting Trustee in the above-entitled matter.

II.

That heretofore, to-wit, on the 1st day of June, 1953, an order was made upon the petition of the Trustee herein to sell certain assets to Ned White-

head, the bankrupt herein, pursuant to a contract of sale. That the chief asset so conveyed under said contract was 378 shares of the capital stock of Whitehead & Co., Inc., a corporation doing business in the Commonwealth of Puerto Rico. That the total purchase price was to be the sum of $13,500.00, to be paid in monthly installments of $750.00 commencing with the 1st day of September, 1953. As security for the said purchase price, the said 378 shares of stock was pledged to the Trustee. Reference is made to the petition of the Trustee on file herein for confirmation and authority to enter into said contract, and the said contract attached to the said petition as an Exhibit. Thereafter, the bankrupt indicated his inability to make such [29] monthly installment payments and an order was entered herein authorizing your petitioner to grant to Ned Whitehead an extension of ninety (90) days for the time of making the payments under the contract, and, in addition, authorizing and directing your petitioner to accept reduced payments in the amount of $500.00 per month.

III.

That since the said sale of the assets, including the said stock, Ned Whitehead the purchaser thereof has only paid the sum of $1000.00 on account of said purchase and despite every effort on the part of your petitioner to collect the balance he has been unable to do so and said contract is now in default.

IV.

That because of current economic conditions in Puerto Rico, the stock of the said corporation has now become of uncertain value and if your petitioner were to conduct a pledge sale he would have to liquidate the corporation in the Commonwealth of Puerto Rico. That all of the assets of the said corporation are heavily encumbered and your petitioner doubts that the full purchase price could be realized by that method. That by reason of the great distance from California and the lack of competitive bidding in Puerto Rico such a liquidation could be disastrous.

V.

That the said Ned Whitehead has made an offer to settle the balance due to your petitioner for the sum of $6000.00 cash and has deposited a treasury check for said sum with his attorneys, Grainger, Carver and Grainger, to be paid over to the Trustee in the event this petition is approved.

VI.

That your petitioner recommends the acceptance of the said offer and the approval of the said compromise. That your petitioner believes that the said compromise is in the best interests of this estate.

Wherefore, your petitioner prays that this Court set a date for hearing on the above petition; that ten (10) days' notice of such hearing be given to creditors herein; that this petition be granted and an order made by the Court authorizing your peti-

tioner to compromise the said controversy with Ned Whitehead on the terms aforesaid.

A. S. MENICK,
Trustee
QUITTNER AND STUTMAN,
/s/ By H. F. QUITTNER,
Attorneys for Trustee [31]

Duly Verified. [32]

[Endorsed]: Filed March 22, 1954.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE RE RELEASE OF WRIT OF EXECUTION

The petition of A. S. Menick respectfully represents to this Court:

1. That he is the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of the above named bankrupt.

2. That on or about the 8th day of October, 1953, Ruth Whitehead, a creditor of the above named bankrupt, procured an ex parte order of the above entitled court permitting her to cause to be levied a writ of execution upon your petitioner as trustee herein, purporting to be upon all assets of the bankrupt in possession of or under the control of your petitioner as such trustee, including stock of Ned Whitehead & Co.

3. That pursuant to said order, said Ruth Whitehead caused an execution to be served upon your

petitioner purporting to be upon all assets of the bankrupt, including stock in the Ned Whitehead & Co.

4. That at the time of the purported levy of execution, it had not been determined what, if any, were the rights of said bankrupt herein in and to the property or moneys in the possession of petitioner [33] and said rights are still undetermined.

5. That during the course of the proceedings herein, Ned Whitehead entered into an agreement with your petitioner as trustee herein, wherein he sought to purchase all of the right, title and interest of the trustee herein and of the bankrupt estate in and to stock in the Ned Whitehead & Co. That said Ned Whitehead, the bankrupt herein is in default in the payments to be made by him hereunder.

6. That said purported levy of said purported writ of execution has interfered and continues to interfere with the administration of the estate of the bankrupt by your petitioner, and particularly in the following manner:

(a) It is interfering and preventing a proposed compromise by Ned Whitehead in respect to a settlement between the trustee and said Ned Whitehead of moneys owing under said agreement; and (b) will interfere with any sale by the trustee of said stock covered by said agreement if it becomes necessary for petitioner to sell at pledgee's sale, in that parties who might otherwise bid will not do so being fearful of litigation arising out of said levy.

7. That said exparte order permitting the said levy was made contrary to law and likewise was contrary to the best interests of this estate.

Wherefore, petitioner prays that an order issue herein, requiring Ruth Whitehead and E. W. Biscailuz, Sheriff of the County of Los Angeles, to appear at a time and place stated, then and there to show cause, if any there be, why an order should not be made and entered herein vacating and setting aside said ex parte order permitting the said levy of said execution, and declaring null and void and of no effect the writ of execution caused to be levied by Ruth Whitehead as set forth herein, and requiring said Ruth Whitehead to execute any instruments of release that may be proper.

Dated this 8 day of July, 1954.

/s/ A. S. MENICK,
Trustee [34]

Comes now Ned Whitehead, through his attorneys, and hereby joins in the foregoing petition.

GRAINGER, CARVER AND GRAINGER,
/s/ By KYLE Z. GRAINGER,
Attorneys for Bankrupt [35]

Duly Verified. [36]

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

A. S. Menick, the Trustee herein, having filed herein a duly verified petition praying that the hereinafter order be entered, now, therefore, good cause appearing therefor, and no adverse interests appearing thereat,

It Is Ordered that Ruth Whitehead and E. W. Biscailuz, Sheriff of the County of Los Angeles, and each of them be, and they are hereby ordered to appear before the undersigned Referee in Bankruptcy, at 339 Federal Building, Los Angeles, California, on the 29 day of July, 1954, at the hour of 10 o'clock a.m. of said day, then and there to show cause, if any there be, why an order should not be made and entered herein vacating and setting aside that certain ex parte order, dated October 8, 1953, permitting levy of execution on the trustee herein, and declaring null and void and of no effect the writ of execution caused by Ruth Whitehead to be levied and served upon the trustee herein, and requiring said Ruth Whitehead to execute any instruments of release that may be proper.

It Is Further Ordered that service may be made upon the respondents herein by mail, by mailing a copy of the within [37] order, and a copy of the petition upon which it is based, to Ruth Whitehead, at 449 North Sycamore, Los Angeles, California, and to her attorney of record herein, A. A. Goldstone, 756 South Broadway, Los Angeles, Cali-

fornia, and to E. W. Biscailuz, Sheriff of the County of Los Angeles, State of California, at least five days before the hearing hereon.

Dated this 15 day of July, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy [38]

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

ORDER VACATING AND SETTING ASIDE ORDER PERMITTING LEVY OF WRIT AND DECLARING NULL AND VOID WRIT OF EXECUTION

A. S. Menick, the Trustee herein, having filed herein a petition for an order directing Ruth Whitehead and E. W. Biscailuz, as Sheriff of the County of Los Angeles to appear and show cause why the hereinafter order should not issue, and the bankrupt having joined in said petition and said order to show cause having been duly issued and served, and having come on duly for hearing before the undersigned Referee in Bankruptcy in his Court Room on the 29th day of July, 1954, at the hour of 10:00 a.m. of said day, at said hearing, the Trustee appearing by his counsel, Quittner and Stutman, (Francis Quittner, Esquire, of counsel) the bankrupt appearing by his counsel, Grainger Carver and Grainger (Kyle Z. Grainger, Sr. of

counsel), Ruth Whitehead appearing in person and by her counsel, and E. W. Biscailuz not appearing, and the Court having heard the evidence, and the arguments of counsel, and having considered the matter, now makes its Findings of Fact, and Conclusions of Law as follows: [39]

Findings of Fact

I.

The Court finds that all of the allegations of the Petition for Order to Show Cause re release of Writ of Execution filed by the trustee herein are true.

Conclusions of Law

From the foregoing Findings of Fact, the Court concludes that the ex parte order procured by Ruth Whitehead on or about the 8th day of October, 1953, permitting her to cause to be levied a writ of execution upon the trustee herein purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co. should be vacated and set aside, and the writ of execution caused to be levied by virtue of said order should be declared null and void and of no effect.

Now, Therefore,

It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possesion of or under the control of the trustee, including the stock

of Ned Whitehead & Co., be and the same is hereby vacated and set aside.

It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect.

Dated this 16 day of August, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [40]

[Endorsed]: Received August 6, 1954. Filed August 16, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF REFEREE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

The petition of Ruth Whitehead respectfully represents:

1. That your petitioner is a creditor of the above-named bankrupt and is a party aggrieved by the order hereinafter set forth and complained of; that she has a judgment for alimony and support of a minor child of the parties, Wendy Gay Whitehead, now twelve (12) years of age; that Ned Whitehead, the above-named bankrupt, has been permitted in the proceeding herein to draw substantial sums for his support, but that for the last twenty-six (26) consecutive months he has failed

and refused, and still fails and refuses to make any payment whatsoever on said order and judgment for the support of petitioner and said minor child; and that he has been and is now outside the jurisdiction of the State of California.

2. That on or about October 8, 1953, an order was made in the above entitled matter by Referee Reuben G. Hunt, permitting the petitioner to levy execution or garnishment upon all of the assets of said bankrupt, Ned Whitehead, in the possession and [41] under the control of A. S. Menick, Trustee in the above entitled matter; provided, however, that said assets shall first be applied to payment and satisfaction of the allowed claims of creditors herein, and also the costs of administration herein, the surplus of said assets in excess of said approved and allowed creditors' claims and expenses of administration to be applied toward payment of the sums due petitioner; that the amount due petitioner for the support of herself and said minor child was then $6,000.00; that said execution or garnishment was thereupon duly and regularly levied upon said trustee; that there was at the time of said levy of execution corporate stock the property of the bankrupt, and that said stock is still in the possession of the said trustee.

3. That the said trustee obtained an order authorizing him to sell said stock to said bankrupt for a sum in excess of $13,000.00 and to take back said stock in pledge as security for the payment of said sum, the bankrupt to pay certain specified monthly payments on said sum; that subsequently,

said trustee sought authority to compromise said sum in excess of $13,000.00 by reducing it to $6,000.00 and to accept $6,000.00 from said bankrupt in full discharge of all claims against him and the bankrupt estate and to deliver said stock to said bankrupt, Ned Whitehead; that said sum of $6,000.00 is approximately the same amount requested herein for attorney's fees and expenses of administration, so that the petitioner and all other unsecured creditors would receive absolutely nothing from the estate herein; and the bankrupt would again be in full possession of his business and again be in fact the sole owner thereof.

4. That on or about July 13, 1954, said trustee filed an Order to Show Cause herein requiring petitioner to show cause why the said levy or execution or garnishment and said order heretofore made should not be vacated and set aside, and be declared null and void; that said petition was heard by the Honorable Hugh L. [42] Dickson, Referee in Bankruptcy, on July 29, 1954; that petitioner, through her counsel, A. A. Goldstone, stipulated and agreed that said pledged stock might be sold to any bidder or purchaser, including the bankrupt, Ned Whitehead; that good title to said stock could be delivered to any bona fide purchaser thereof, free and clear of the petitioner's execution, but that if the stock were sold to Ned Whitehead, the bankrupt herein, as to him only the said execution should continue in full force and effect; that petitioner so far has not in any manner sought to and did not interfere with the administration of the

above-entitled estate, but that the Honorable Hugh L. Dickson, Referee herein, made an order setting aside and declaring null and void said execution or garnishment of petitioner; that petitioner is informed and believes and therefore, alleges that said order of said Referee is improper and not in accordance with the law and is in excess of his jurisdiction. Said order is as follows:

"A. S. Menick, the Trustee herein, having filed herein a petition for an order directing Ruth Whitehead and E. W. Biscailuz, as Sheriff of the County of Los Angeles to appear and show cause why the hereinafter order should not issue, and said order to show cause having been duly issued and served, and having come on duly for hearing before the undersigned Referee in Bankruptcy in his Court Room on the 29th day of July, 1954, at the hour of 10:00 a.m. of said day, at said hearing, the Trustee appearing by his counsel Quittner and Stutman (Francis Quittner, Esquire, of counsel) the bankrupt appearing by his counsel, Grainger Carver and Grainger (Kyle Z. Grainger, Sr. of counsel), Ruth Whitehead appearing in person and by her counsel, and E. W. Biscailuz, not appearing, and the Court having heard the evidence, and the arguments of counsel, and having considered the matter, [43] now makes its Findings of Fact, and Conclusions of Law as follows:

Findings of Fact

I.

"The Court finds that all of the allegations of the

Petition for Order to Show Cause re release of Writ of Execution filed by the trustee herein are true.

Conclusions of Law

"From the foregoing Findings of Fact, the Court concludes that the ex parte order procured by Ruth Whitehead on or about the 8th day of October, 1953, permitting her to cause to be levied a writ of execution upon the trustee herein purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co. should be vacated and set aside, and the writ of execution caused to be levied by virtue of said order should be declared null and void and of no effect.

"Now, Therefore,

"It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of Ned Whitehead & Co., be and the same is hereby vacated and set aside.

"It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect.

"Dated this 16th day of August, 1954."

Wherefore, petitioner prays that said order be reviewed [44] by a judge of this Court, the execution

restored; that said order be set aside and vacated and that the Referee promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of the question presented and a transcript of the evidence taken at said hearing, together with all exhibits, if any, therein offered; that the trustee be restrained from selling, assigning, or transferring said stock until further order of the court.

/s/ A. A. GOLDSTONE,
Attorney for Ruth Whitehead,
Petitioner

/s/ RUTH WHITEHEAD,
Petitioner [45]

Affidavit of Service by Mail attached. [46]

Duly Verified. [48]

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW

To the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That in the within proceedings, A. S. Menick, the Trustee, on July 13, 1954, filed a petition for order

to show cause re release of writ of execution, wherein he prayed that an order issue requiring Ruth Whitehead and E. W. Biscailuz as Sheriff of the County of Los Angeles, to appear at a time and place stated, and show cause why an order should not be made and entered herein vacating and setting aside a previous ex parte order permitting a levy of execution and declaring null and void and of no effect the writ of execution caused to be levied by Ruth Whitehead. Upon such petition, an order to show cause was issued, requiring said parties to appear before the undersigned Referee in Bankruptcy, and on the 29th day of [49] July, 1954, a hearing was had upon the said petition, and evidence was presented that on October 8, 1953, Ruth Whitehead, a creditor of the bankrupt, procured an ex parte order of this court permitting her to levy a writ of execution upon the trustee, purporting to be upon all assets of the bankrupt in possession of, or under the control of the trustee. Pursuant to said order, said Ruth Whitehead caused an execution to be served upon the trustee purporting to be upon all assets of the bankrupt. At the time of the levy of said writ of execution, it had not been determined what, if any, were the rights of the bankrupt in and to the properties or moneys in the possession of the trustee. The said rights are still not determined.

During the course of the bankruptcy proceedings, Ned Whitehead, the bankrupt, entered into an agreement with the trustee for the purchase of the right, title and interest of the trustee in and to

stock in Whitehead & Co., Inc., wherein installment payments were provided to be made and the said stock in Whitehead & Co., Inc. was pledged with the trustee to secure the payments to be made under the said agreement.

Thereafter, Ned Whitehead became in default in the payments to be made by him under said agreement; and after so becoming in default, he made an offer of compromise to the trustee in respect to a settlement between the trustee and him respecting the moneys owing under said agreement.

The said Whitehead & Co., Inc. is a corporation located and having its principal place of business in Puerto Rico, and is a corporation dependent in the main for any successful operation upon the personal efforts of Ned Whitehead. Said levy of execution interferes with the said compromise settlement, and also interferes with any pledgee's sale of the stock.

I, as Referee, having heard the evidence and the [50] arguments of counsel, on the 16th day of August, 1954, made my Findings of Fact, Conclusions of Law and Order all as set forth in the order of August 16, 1954, being the order sought to be reviewed by the petition for review in this proceeding. By said order, I adjudged as follows:

"It Is Ordered that the Order of this Court dated October 8, 1953, permitting Ruth Whitehead to cause to be levied a writ of execution upon A. S. Menick, the trustee herein, purportedly upon all the assets of the bankrupt in the possession of or under the control of the trustee, including the stock of

Ned Whitehead & Co., be and the same is hereby vacated and set aside.

"It Is Further Ordered that the writ of execution levied upon the trustee by virtue of said order be, and the same hereby is declared and the same is null and void and of no force or effect."

Thereafter, there was duly filed by the said Ruth Whitehead a petition for review of the said order.

Questions Presented

The questions presented are:

1. Did the Referee properly order that the ex parte order of October 8, 1953, permitting Ruth Whitehead to cause to be levied said writ of execution be vacated?

2. Did the Referee properly order that the writ of execution levied upon the trustee by virtue of said order be annulled?

Papers Submitted With This Certificate

In compliance with the provisions of Section 39-a (8) of the Bankruptcy Act, I attach to this Certificate the following: [51]

(a) Petition for Order to Levy Execution upon Assets in Possession of Trustee and Order to Levy Execution Upon Assets in Possession or Under Control of Trustee (Filed October 8, 1953).

(b) Petition for Confirmation and Authority to Enter into Contract; and Agreement attached thereto (Filed May 13, 1953).

(c) Order re Confirmation of Sale (Filed June 1, 1953).

(d) Petition to Compromise (Filed March 22, 1954).

(e) Petition for Order to Show Cause re Release of Writ of Execution (Filed July 13, 1954).

(f) Order to Show Cause (Filed July 13, 1954).

(g) Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution (Filed August 16, 1954).

(h) Petition for Review of Order of Referee (Filed August 18, 1954).

Respectfully submitted this 14th day of October, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [52]

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF ORDER OF REFEREE

To the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division:

The following points and authorities are submitted in support of the petition of Ruth Whitehead for review of the Order of Hugh L. Dickson, Referee in Bankruptcy, in the above-entitled matter.

In Bankers' Mortg. Co. of Topeka, Kansas, et al., vs. McComb, et al., 60 F.2d 218, it was held as follows:

"It is a general rule that, where a person's possession or control of property constitutes custodia legis, he cannot be subjected to garnishment process in respect of such property (citing among other cases—

In re Argonaut Shoe Co., (C.C.A. 9) 187 F. 784).

"The reason for the rule is that to require such a person to respond in garnishment would result in an interruption of the orderly progress of judicial proceedings and in an invasion of the jurisdiction of the [53] court which has legal custody of such property. (Citing cases, including In re Argonaut Shoe Co., supra).

"Such a person, with the consent of the court having custody of such property may be held as garnishee after the purposes of the law's custody have been accomplished and such court has by order directed delivery thereof to the garnishee-debtor. Under such circumstances, garnishment will not interrupt the progress of judicial proceedings in such court nor invade its jurisdiction. The officer holds the property not for the law but for the persons entitled thereto; and the reason for the rule no longer exists. (Citing cases)"

/s/ A. A. GOLDSTONE,

Attorney for Ruth Whitehead [54]

Affidavit of Service by Mail attached. [55]

[Endorsed]: Filed October 19, 1954.

In the United States District Court for the Southern District of California, Central Division

In Bankruptcy No. 55507-WM

In the Matter of NED WHITEHEAD, dba Whitehead & Co., Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER OF AUGUST 16, 1954

Upon the petition for review filed August 18, 1954 by Ruth Whitehead; upon Referee Hugh L. Dickson's Certificate on Review filed October 14, 1954; upon the proceedings had before the referee as appear from his certificate; and it appearing that the referee predicated his order upon his findings that the facts alleged in the "Petition for Order to Show Cause Re Release of Writ of Execution" are true, which findings of fact are to be accepted upon review by this Court unless "clearly erroneous" [General Orders 37, 47; Fed. Rules Civ. Proc., Rule 52(a); see Bankruptcy Act § 39(a)(8), 11 U.S.C. § 67(a)(8)];

It Is Now Ordered that the Referee's "Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution" filed August 16, 1954 is hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on

(1) Referee Hugh L. Dickson;

(2) A. A. Goldstone, Esquire, attorney for petitioner; and

(3) Messrs. Grainger, Carver & Grainger, attorneys for respondent.

December 1, 1954.

/s/ WM. C. MATHES,
United States District Judge [61]

[Endorsed]: Judgment Entered and Filed December 2, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ruth Whitehead, Creditor of the above-named bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution dated August 16, 1954, and from the Order on Review and Referee's Order of August 16, 1954, dated December 1, 1954, by the above-entitled matter, and from the whole thereof.

Dated: December 22, 1954.

/s/ A. A. GOLDSTONE,
Attorney for Ruth Whitehead,
Appellant [62]

Affidavit of Service by Mail attached. [63]

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 68, inclusive, contain the original Petition in Involuntary Bankruptcy, Order of General Reference, Petition for Order to Levy Execution Upon Assets in Possession of Trustee and Order, Petition for Confirmation and Authority to Enter Into Contract, Order Re Confirmation of Sale, Petition to Compromise, Petition for Order to Show Cause Re Release of Writ of Execution, Order to Show Cause, Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution, Petition for Review of Order of Referee, Certificate on Review, Memorandum of Points and Authorities in Support of Petition for Review of Order of Referee, Memorandum of Points and Authorities on Behalf of Respondents on Review of Order of Referee, Order on Review of Referee's Order of August 16, 1954, Notice of Appeal, Designation of Record on Appeal, and Designation of Additional Record on Appeal, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 25th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

[Endorsed]: No. 14667. United States Court of Appeals for the Ninth Circuit. Ruth Whitehead, Appellant, vs. A. S. Menick, Trustee in Bankruptcy of the Estate of Ned Whitehead, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14667

RUTH WHITEHEAD, Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of Ned Whitehead, doing business as Ned Whitehead & Co., Bankrupt, Appellee.

DESIGNATION OF RECORD ON APPEAL

Comes Now Ruth Whitehead, the Appellant in the above entitled action, and designates the statement of points and authorities and portions of the record on appeal to be printed pursuant to Rule 17 of the above entitled Court:

1. Petition for Order to Levy Execution Upon Assets in Possession of Trustee, and Order;
2. Order to Levy Execution Upon Assets in Possession or Under Control of Trustee;
3. Petition for Order to Show Cause re Release of Writ of Execution;
4. Order to Show Cause re Vacating and Setting Aside Order dated October 8, 1953, Permitting Levy of Execution on Trustee;
5. Order Vacating and Setting Aside Order Permitting Levy of Writ and Declaring Null and Void Writ of Execution;
6. Petition for Confirmation and Authority to Enter into Contract; and Agreement attached thereto (filed May 13, 1953);

7. Order re Confirmation of Sale (filed June 1, 1953);

8. Petition to Compromise (filed March 22, 1954);

9. Petition for Review of Order of Referee;

10. Appellant's Memorandum of Points and Authorities in Support of Petition for Review of Order of Referee;

11. Certificate on Review;

12. Order on Review of Referee's Order of August 16, 1954;

13. Notice of Appeal.

Dated this 31st day of May, 1955.

/s/ A. A. GOLDSTONE,
Attorney for Ruth Whitehead,
Appellant

[Endorsed]: Filed June 1, 1955. Paul P. O'Brien, Clerk.

No. 14667.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy, of the Estate of NED WHITEHEAD, doing business as NED WHITEHEAD & Co., Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

SEP 15 1955

PAUL P. O'BRIEN, CLE

A. A. GOLDSTONE.
756 South Broadway,
Los Angeles 14, California,
Attorney for Ruth Whitehead, Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TOPICAL INDEX

PAGE

Facts 1

I.

The order made by Referee Reuben G. Hunt permitting the levy of execution or garnishment was valid.................................. 4

II.

The order made by Referee Dickson was improper and not a valid exercise of discretion and the United States District Court erred in sustaining such order.. 5

AUTHORITY CITED

CASE PAGE

Bankers' Mort. Co. of Topeka, Kansas, et al. v. McComb, et al., 60 F. 2d 218..4, 5

No. 14667.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy, of the Estate of NED WHITEHEAD, doing business as NED WHITEHEAD & Co., Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Facts.

The Appellant, Ruth Whitehead, is the former wife of the above-named bankrupt, Ned Whitehead and also a creditor of Ned Whitehead. She has a judgment against Ned Whitehead for her support as well as a judgment for the support of Wendy Gay Whitehead, minor child of the parties and now twelve years of age. [Tr. of Rec. pp. 3-4.]

Ned Whitehead, the above-named bankrupt, has been permitted to draw substantial sums out of the estate herein, that is, he was permitted to draw salary [Tr. of Rec. p. 12, par. 8] and also to draw $1,000.00 plus actual transportation costs and $500.00 per month subsistence allowance while in Puerto Rico [Tr. of Rec. p. 13(a) and (b)], in the guise of travel and entertainment expenses and subsistence, but from July 15, 1952, to the present

time, he has not paid anything whatsoever for the support of Appellant, Ruth Whitehead, or for the support of the minor child of the parties, Wendy Gay Whitehead.

On or about October 8, 1953, an order was made in the above-entitled matter by Referee Reuben G. Hunt, permitting Appellant to levy execution or garnishment upon all of the assets of said bankrupt, Ned Whitehead, in the possession and under the control of A. S. Menick, Trustee in the above-entitled matter, provided, however, that the assets be first applied to payment and satisfaction of the allowed claims of creditors and costs of administration, and the surplus of said assets in excess of the approved and allowed claims of creditors and expenses of administration be applied to the sum due Appellant, which was then $6,000.00 [Tr. of Rec. pp. 5-6]; that said execution or garnishment was thereupon duly and regularly levied upon the Trustee, and at the time of such levy there was in the possession of the Trustee corporate stock of Ned Whitehead in the company which is wholly owned and controlled by him. [Tr. of Rec. p. 7, par. II.]

The Trustee entered into a contract to sell back to Ned Whitehead the 378 shares of stock of Whitehead and Co., together with a few miscellaneous items of personal properties for $13,500.00, that is, all the remaining assets in possession of the Trustee except accounts receivable and cash in the possession of the Trustee [Tr. of Rec. pp. 8-18]. The Referee made his order confirming the sale to Whitehead as requested [Tr. of Rec. pp. 18-19]. Under this arrangement the stock was sold back to Whitehead and he pledged it to the Trustee as security for payment of the $13,500.00, payable at the rate of $750.00 per month with interest at 6 percent on installments not paid when due. [Tr. of Rec. pp. 9-10.]

However, Ned Whitehead was in the process of making a deal whereby he could get back his stock for only $6,000.00, instead of the sum he had agreed to pay. [Petition to Compromise, Tr. of Rec. pp. 19-22.]

A petition for order to show cause *re* release of writ of execution was filed by the Trustee and joined in by Ned Whitehead through his attorneys, Grainger, Carver & Grainger. The petition, as appellant is informed and believes, was prepared for the Trustee, who presumably represents the creditors, by Grainger, Carver & Grainger, the attorneys for Ned Whitehead. [Tr. of Rec. pp. 22-24.]

At the hearing before the Referee, it was claimed that Appellant was interfering with the administration of the estate herein because her execution on the stock prevented turning it over to Ned Whitehead for $6,000.00. Appellant, however, through her counsel, informed the Referee that the stock could be sold to anyone, including Ned Whitehead, without objection by Appellant, but that if the stock were sold to Whitehead, it should thereafter be delivered to the Sheriff of Los Angeles County, under the execution. Counsel for both the Trustee and for Whitehead then stated that Ned Whitehead was the only buyer of the stock and that unless sale thereof could be made to him at his price, administration of the estate was being interfered with, and that Whitehead would not buy the stock unless it was delivered to him. The Referee thereupon held that the execution was annulled. [Tr. of Rec. pp. 26-28.] The stock was never offered for sale at public sale.

The District Court sustained the Referee with the statement that Appellant and Wendy Gay Whitehead were "disappointed creditors" because there would be no pay-

ment of any kind to general creditors, including Appellant and Wendy.

This appeal followed.

I.

The Order Made by Referee Reuben G. Hunt Permitting the Levy of Execution or Garnishment Was Valid.

In *Bankers' Mortg. Co. of Topeka, Kansas, et al. v. McComb, et al.,* 60 F. 2d 218, it was held as follows:

> "It is a general rule that, where a person's possession or control of property constitutes custodia legis, he cannot be subjected to garnishment process in respect of such property (citing among other cases—*In re Argonaut Shoe Co.* (C. C. A. 9), 187 F. 784).
>
> "The reason for the rule is that to require such a person to respond in garnishment would result in an interruption of the orderly progress of judicial proceedings and in an invasion of the jurisdiction of the court which has legal custody of such property. (Citing cases, including *In re Argonaut Shoe Co., supra*).
>
> *"Such a person, with the consent of the court having custody of such property may be held as garnishee after the purposes of the law's custody have been accomplished and such court has by order directed delivery thereof to the garnishee-debtor. Under such circumstances, garnishment will not interrupt the progress of judicial proceedings in such court nor invade its jurisdiction. The officer holds the property not for the law but for the persons entitled thereto; and the reason for the rule no longer exists.* (Citing cases)." (Emphasis ours.)

II.

The Order Made by Referee Dickson Was Improper and Not a Valid Exercise of Discretion and the United States District Court Erred in Sustaining Such Order.

In the instant case, there was no interference by Appellant, Ruth Whitehead, with respect to sale of the stock to anyone, including Ned Whitehead, and as stated in *Bankers' Mortg. Co. of Topeka, Kansas, et al. v. McComb, et al., supra,* the reason for the rule against execution or garnishment herein does not exist.

The order of Referee Dickson which vacated the prior order of Referee Hunt permitting levy of execution or garnishment and which ordered the writ of execution annuled is therefore improper and invalid, or if he had any discretion in the matter, such order by Referee Dickson was an abuse of discretion, and the order of the United States District Court on review of the referee's order of August 16, 1954, is erroneous and should be reversed.

Respectfully submitted,

A. A. Goldstone,

Attorney for Ruth Whitehead, Appellant.

No. 14667

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of NED WHITEHEAD, doing business as NED WHITEHEAD & Co., Bankrupt,

Appellee.

APPELLEE'S BRIEF.

QUITTNER & STUTMAN,
By GEORGE M. TREISTER,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellee.

FILED
SEP 30 1955
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Jurisdiction 1

Statement of the case........ 1

Issues presented 2

Argument 3

I.

The bankruptcy court had no power to allow appellant to levy on assets in the possession of appellee trustee........ 3

II.

Assuming that the bankruptcy court had discretion to permit appellant's levy, it wisely exercised that discretion by denying permission 5

Conclusion 5

TABLE OF AUTHORITIES CITED

CASES — PAGE

Argonaut Shoe Co., In re, 187 Fed. 784, 26 Am. B. R. 584....3, 4

Bankers' Mortg. Co. of Topeka, Kansas v. McComb, 60 F. 2d 218 4

Electric Telephone Co., Matter of, 211 Fed. 88, 31 Am. B. R. 612 4

STATUTE

Bankruptcy Act, Sec. 24 (11 U. S. C., Sec. 47).......... 1

No. 14667

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH WHITEHEAD,

Appellant,

vs.

A. S. MENICK, Trustee in Bankruptcy of the Estate of NED WHITEHEAD, doing business as NED WHITEHEAD & Co., Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The Court has jurisdiction of this appeal under Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47).

Statement of the Case.

On October 8, 1953, appellant, a creditor of the bankrupt, obtained an *ex parte* order from the Referee authorizing her to levy execution and/or garnishment upon any assets of the bankrupt in the possession of Appellee Trustee in Bankruptcy [Tr. pp. 5-6].* Subsequently,

---

*All citations to the record refer to the printed Transcript of Record on file in the Court of Appeals.

appellee petitioned to have the order of October 8, 1953 vacated and the execution declared void, upon the grounds that the levy was impeding the administration of the estate and that the order had been entered contrary to law. [Tr. pp. 22-24.] After hearing, the Referee sustained appellee's position and by order of August 16, 1954, granted the Trustee's petition. [Tr. pp. 22-28.]

On review, the District Judge affirmed the holding of the Referee. [Tr. pp. 39-40.] This appeal followed. [Tr. p. 40.]

Issues Presented.

1. May a Court of Bankruptcy authorize a creditor armed with a state court writ of execution or other process to levy upon assets in the possession of a Trustee in Bankruptcy?

2. Assuming that the Bankruptcy Court is empowered to authorize such a levy, was it an abuse of discretion in the present case to vacate the order permitting the levy?

ARGUMENT.

I.

The Bankruptcy Court Had No Power to Allow Appellant to Levy on Assets in the Possession of Appellee Trustee.

It has long been the established rule in this Circuit that a bankruptcy court cannot permit a levy under state court process upon property in the possession of the trustee.

> *In re Argonaut Shoe Co.,* 187 Fed. 784, 26 Am. B. R. 584 (C. A. 9, 1911).

The *Argonaut* case involved an attempt by a creditor of a claimant who was entitled to a bankruptcy dividend to levy upon that dividend after declaration but before the trustee had paid it. The creditor argued that California law permitted garnishment of funds in the possession of an officer of the state court under similar circumstances. This court rejected that analogy:

> "The respondents rely upon the rule established by the state courts of California that, where an order is made by a court directing payment of funds to claimants, the court immediately loses jurisdiction of the particular funds, and the person to whom the money is due has the right, upon failure of the trustee or officer of the court to pay the money, to enforce collection thereof; the fund, by operation of law, immediately vesting in the parties who become legally entitled thereto; citing Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, Estate of Nerac, 35 Cal. 397, 95 Am. Dec. 111, and decisions of other state courts. But the rule of a state court permitting the garnishment of

> dividends after they have been declared by an officer of a state court, such as a receiver, administrator, or a trustee, cannot affect the administration by a federal court of an estate in bankruptcy. Clark v. Shaw, (C. C.), 28 Fed. 356, and cases there cited. The right to garnishee funds in *custodia legis* must depend upon express statutory authority. No such authority is to be found in the bankruptcy law. The distribution of the assets of the bankrupt therefore cannot be stayed or prevented by the process of a state court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation."

To the same effect is the holding of the Court of Appeals for the Seventh Circuit in *Matter of Electric Telephone Co.,* 211 Fed. 88, 31 Am. B. R. 612 (C. A. 7, 1914).

If the Bankruptcy Court lacks power to permit a levy upon dividends that have already been declared, *a fortiori* it cannot permit a levy which, as in the present case, seeks to reach a bankrupt's mere potential interest in the general assets of the estate.

Bankers' Mortg. Co. of Topeka, Kan. v. McComb, 60 F. 2d 218 (C. A. 10, 1932), relied upon by appellant, was not a bankruptcy case. There, the question considered was whether levy was permissible upon securities deposited with the United States Commissioner as bail in a criminal matter. No problem of interference with the administration of an estate of any kind was involved. Most important, appellant's attempt to extend the language of the *McComb* opinion to the present bankruptcy context is plainly inconsistent with this court's holding in the *Argonaut* case, *supra.*

II.

Assuming That the Bankruptcy Court Had Discretion to Permit Appellant's Levy, It Wisely Exercised That Discretion by Denying Permission.

The only asset which appellant's levy might reach is certain shares of Whitehead & Co., a corporation controlled by the bankrupt and which does business in Puerto Rico. There is, of course, no general market for the sale of the stock of this closely-held corporation. The only substantial purchase offer has been made by the bankrupt himself and, accordingly, appellee trustee has long been attempting to dispose of the estate's interest in the stock to this prospective purchaser. [See Petition to Compromise, Tr. pp. 19-22.]

Obviously, however, the bankrupt refuses to pay the purchase price to appellee so long as appellant threatens to seize the shares under execution the moment the transaction is consummated. For this reason, appellant's attempted levy has very seriously interfered with the orderly liquidation of the bankruptcy estate and has made it impossible for appellee to complete his administration. Therefore, the Referee after hearing the facts of the case decided not to permit further interference with the administration and properly vacated the order of October 8, 1953, which had been entered *ex parte*. If any discretion existed, such a decision certainly was a wise exercise of it.

Conclusion.

For the foregoing reasons, the Order of the District Judge, affirming the Referee's order of August 16, 1954, should be affirmed.

Respectfully submitted,

Quittner & Stutman,

By George M. Treister,

Attorneys for Appellee.

No. 14668

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

FILED

MAY -2 1955

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-15-55

No. 14668

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,

Appellant,

vs.

MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-15-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment of Answer of Berkshire Industrial Farm	50
Amendment of Motion for New Trial	101
Answer of Berkshire Industrial Farm	39
Answer of James Harvey Short Individually and as Administrator	48
Answer of United States	33
Certificate of Clerk to Record on Appeal	108
Complaint	3
Designation of Record on Appeal and Statement of Points to Be Relied Upon on Appeal	110
Judgment	102
Memorandum Opinion	71
Minute Entry September 28, 1954—Order Denying Motion for New Trial	101
Names and Addresses of Attorneys	1
Notice of Appeal by the United States	105

INDEX PAGE

Notice of Motion for New Trial.............. 90

Change or Designation of Beneficiary.... 100

Memorandum of Points and Authorities... 92

Motion for New Trial.................. 91

Order Extending Time for Filing Record on Appeal and Docketing Appeal............ 105

Statement of Points to Be Relied Upon on Appeal 106

Stipulation of Facts and for Hearing and Submission of Case Pursuant to Stipulation.... 51

NAMES AND ADDRESSES OF ATTORNEYS

LLOYD H. BURKE,
United States Attorney,

RICHARD C. NELSON,
Asst. United States Attorney,
P. O. Bldg.,
San Francisco, Calif.,

Attorneys for U.S.A.

FRANCES T. CORNISH,
FRANK V. CORNISH, ESQ.,
404 American Trust Bldg.,
Berkeley 4, Calif.,

Attorneys for James Harvey Short.

GEORGE CLARK, ESQ.,
610 American Trust Bldg.,
Berkeley, Calif.,

Attorney for Plaintiff and Appellee.

ficiary under said insurance policy. Said policy was in the sum of $10,000.00. That said Ethel Grace Short died on June 14th, 1951. That plaintiff became and is the duly appointed, qualified and acting Administratrix of the estate of Ethel Grace Short, deceased, which said estate is in administration in Alameda County, California. That said Ethel Grace Short became entitled to certain payments accruing on said policy prior to her death and said sums have not been paid.

2.

That the aforesaid policy was issued under what is known as the National Service Life Insurance Act of 1940. That by said insurance policy the life of said Irving Ritchie Short was insured in favor of his mother, the said Ethel Grace Short, in the sum of $10,000.00.

That on or about April 25, 1949, said Irving Ritchie Short changed said insurance policy by designating his said mother, Ethel Grace Short, as primary or principal beneficiary under said insurance policy, and his brother, defendant, James Harvey Short, and defendant, Berkshire Industrial Farm of Canaan, New York, as contingent beneficiaries under said policy. Said change in said policy provided, in effect, that said principal beneficiary should be paid $10,000.00 under said policy and that the payments to said contingent beneficiaries should —if they became payable—be in the sum of $5,000.00 each.

That plaintiff has, as yet, been unable to ascertain whether said Berkshire Industrial Farm had or has

capacity to receive gifts under National Service Life Insurance Policies.

Said James Harvey Short became and he is the duly appointed, qualified and acting administrator of the estate of said Irving Ritchie Short, deceased, and he claims the entire amount of said policy as such administrator and he claims that if said appointment of contingent beneficiaries took effect, their rights are subject to the claims of plaintiff.

3.

That a true copy of the aforesaid insurance policy is as follows:

The United States of America
Veterans' Administration
Washington, D. C.
National Service Life Insurance

Date Insurance Effective January 1, 1943.
Certificate No. N- 8 041 741.

This Certifies That Irving Ritchie Short has applied for insurance in the amount of $10,000, payable in case of death.

Subject to the payment of the premiums requires, this insurance is granted under the authority of The National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which together with the application for this in-

surance, and the terms and conditions published under authority of the Act, shall constitute the contract.

(Stamped):

FRANK T. HINES,
Administrator of Veterans' Affairs;

/s/ DONALD J. TURNER,
Registrar.

Countersigned at Washington, D. C., Feb. 15, 1943.

Mrs. Ethel Grace Short
1386 Euclid Avenue
Berkeley, California.

Insurance Form 360.

4a.

That the above-entitled District Court is a district court of the United States, in and for the district in which the plaintiff resides and that the place of residence of defendant, James Harvey Short, is the same as that of the plaintiff. Said two parties reside at the Presidio, California.

4b.

That Ethel Grace Short is at times herein referred to as Mrs. Short. That said Irving Ritchie Short is at times herein referred to as Irving Short.

5.

That the Veterans' Administration contends, and the defendant, United States of America, contends

that the Estate of said Ethel Grace Short has no right under said policy because the fact of said Irving Short's death was not determined until after the death of Ethel Grace Short, which latter death occurred on June 14th, 1951.

That the plaintiff contends: (a) That there was no reasonable ground for delaying the determination of the fact of death of said Irving Short until June 14th, 1951, the date of the death of Ethel Grace Short, and (b) that it was not the law that it was necessary that Mrs. Short should be alive in order to entitle her to payments under said policy.

Other contentions of plaintiff are hereinafter set out.

As regards the waste of time by the Veterans Administration in establishing the death of said Irving R. Short the plaintiff alleges:

That when the claim of Ethel Grace Short was filed upon said policy of insurance, the Veterans Administration took the position that it must first have a report from the War Department as to whether said Irving Ritchie Short was or was not in the military service at the time of his death and —although the War Department report required proof of death itself—the State Department must then make a separate report that Irving Ritchie Short was dead. It will appear that the Government did not permit Mrs. Short to prove said death in the usual way, and that it used as an excuse for postponing determining the fact of the said

death the aforesaid rules which had no application and which, as applied to this case, were unreasonable. It did not determine Irving Short died until June 14, 1951.

Plaintiff pleads certain facts which support the claim hereinbefore set forth.

6.

As stated, Irving Ritchie Short died in Tokio on August 30, 1952.

The War Department at once knew of the death of said Irving Short and advised his mother as to such death. The State Department knew almost immediately of said death and arranged to embalm and ship the body of the decedent home to Berkeley for burial. The burial was attended to in Berkeley by the mother, the said Ethel Grace Short.

The decedent died in a United States Army Hospital in Tokio. His brother, James Harvey Short, was present in Tokio at the time of the death of said Irving Short. The Veterans Administration was so advised. The brother could have sworn at any time to the fact of death of Irving Short and that the War Department promised to ship the body home.

That said Irving Ritchie Short had, prior to his death, taken his discharge from the United States Army after his service therein during World War No. II. He was a captain. When hostilities broke out in Korea, he was in Formosa and he went from there to Tokio to re-enlist in the United States

Army. On being given the required medical examination by the army doctors, it was found that he was seriously ill and was at once placed in a United States Army Hospital in Tokio in order that he might be given necessary medical care and treatment. It developed that he had polio. He died as a result of said disease within a few days after being placed in said hospital and while he was receiving such care and treatment for said affliction. The date of his death was August 30, 1950. Immediately thereafter, the Adjutant General's Office sent to the mother, Ethel Grace Short, a radiogram dated August 31st, 1950, which was in the same form as if said Irving Ritchie Short had again entered the military service.

A copy of said radiogram is as follows:

OA522

1950 Aug 31 PM
San Francisco Calif 31 350P

O.SFC853 Govt Pd-WUX
Mrs. Ethel M. Short
1386 Euclid Ave Berkeley Calif

From AGAO-C Signed Witsell The Adjutant General The Secretary of the Army Regrets to Inform You That Your Son Irving R Short Died 30 August in Tokyo Japan Pd He Was Hospitalized in Tokyo on 26 August Seriously Ill with Poliomyelitis Pd My Sympathy Is with You in Your Bereavement.

THE ADJUTANT GENERAL
Washington DC 3120572

That it is clear the War Department was advised as to said death prior to the time a claim was presented on said policy.

The hospital referred to in said radiogram was a hospital under the control of the United States Government and, under Regulation 3.55(b) of Title 38 of applicable Federal Regulations, the medical officer in charge of such hospital had authority to issue a certificate establishing the death of said Irving Short for the purpose of recovering under said life insurance policy.

That by a Speedletter dated September 20th, 1950, the State Department advised said Ethel Grace Short that she would have to provide said Department with $500.00 to meet the expense of shipping said Irving Ritchie Short's remains to Berkeley, California, because of the fact he was not in the military service of the United States when he died. A copy of said Speedletter is as follows:

Department of State
Washington 25, D. C.
Speedletter

In reply to
Date September 20, 1950

Sep 20 1950

Speedletter to
Mrs. Ethel Short,
1386 Euclid Avenue,
Berkeley, California.

Reference is made to the telegram sent to you by the Department of the Army on August 31, 1950,

informing you of the death of your son Irving R. Short on August 30, 1950, at Tokio, Japan. The Department of the Army has made a thorough Investigation of its records, both in the United States and Japan, and it has been definitely established that Mr. Short was not a member of the Armed Forces at the time of his death, and as a result the matter has been referred to this Dept. for final disposition of the remains.

You will understand, of course, that American consular officers do not have funds for the preparation and disposition of the remains of private American citizens who die within their consular jurisdiction. Therefore it will be necessary for you to make a deposit with the Dept. to cover any expenses incurred in connection with the preparation and eventual disposition of the remains. If it is your desire to have your son's body returned to the U. S. for interment, it is suggested that you forward to this Dept. a certified check, bank draft or Postal money order for $500 payable to the Secretary of State of the U. S. It will be necessary also for you to furnish also the name and address of the undertaker to whom the remains are to be consigned. On the other hand if it is your desire that the remains are to be interred locally, the Department will request the appropriate American counselor officer in Japan to obtain estimate of such costs for submission to you. Any unexpended balance of your deposit will be returned to you; however, if the expenses exceed the amount of your deposit, an additional deposit will be required.

The Dept. will appreciate a prompt attention to this matter.

Sincerely yours,

For the Sec. of State:

FRANCIS E. FLAHERTY,
Assistant Chief, Division of
Protective Services.

By air mail letter dated September 23rd, 1950, said Ethel Grace Short sent said State Department a draft for $500.00 to cover said expense and thereupon said State Department arranged to and did ship the body of Irving Short home to Berkeley for burial. Such an act would never have occurred without careful identification of the said body. The burial occurred in Berkeley, a fact known to the family and everyone concerned.

7.

That, as will be explained, the Army physician of said hospital who cared for said Irving Short in his last illness, issued a physician's certificate on a carefully prepared form used by life insurance to show the death of an insured person when claim is asserted on a policy of insurance issued by such companies. That this certificate was forwarded to the Veterans Administration by said Ethel Grace Short after she had filed her claim on said policy with said Veterans Administration. That said certificate was wholly disregarded by the Veterans Administration as evidence. It was obtained to supply proof of

death under a policy of insurance carried by decedent in favor of his mother, Ethel Grace Short, in the Prudential Life Insurance Company, but that said company, on being supplied with the radiogram hereinbefore mentioned, treated that as sufficient proof of death of Irving Short and did not require delivery of said physician's certificate as a condition of the payment of its policy. Said Certificate clearly established the fact of death of Irving Ritchie Short and the time and the cause thereof.

8.

That on or about September 15th, 1950, said Ethel Grace Short ascertained that decedent had been paying premiums on the aforesaid insurance policy copied in Par. 3. That, however, the policy itself could not at said time be found.

That on or about September 15, 1950, Mrs. Short phoned the district office of the Veterans Administration in Oakland, California, that decedent was probably carrying insurance and she was advised to call at said office and bring said radiogram hereinbefore mentioned. That a relative made said call on her behalf, as Mrs. Short was at said time confined to her home on account of illness. That Mrs. Short was provided with a form of claim to make out upon said policy. That she filled out this form and caused it to be left with said district office on or about September 25, 1950, together with said radiogram. That said office had the number of said policy and knew that the decedent had been paying premiums thereon.

That later, on or about October 18, 1950, said Ethel Grace Short received from said district office a postcard stating that the records regarding said claim were being forwarded to the Central Office of the Veterans Administration at Washington, D. C.

9.

Under date of November 1, 1950, said Ethel Grace Short, through her attorneys, wrote the Veterans Administration in Washington, D. C., that, according to the postcard received from the district office in Oakland, California, the records in the matter of the claim had been sent to the Central Office of the Veterans Administration in Washington. This letter explained that at the outbreak of the Korean War, Irving Short was in Formosa, that he was a veteran of World War II, that he went from Formosa to Tokio to again enter the service and that his medical examination showed he was ill with polio and that he was placed in the Army Hospital in Tokio for treatment, where he died in a few days.

Thus, about Novmber 1, 1950, the Veterans Administration was specifically advised that Irving Short died while he was a patient in the United States Army Hospital in Tokio.

In addition, the latter fact was indicated in the death notice radiogram, dated August 31, 1950, which was delivered to the Veterans Administration, along with the claim of said Ethel Grace Short.

Said letter explained Mrs. Short was not well and asked that the case be given special attention.

Mrs. Short had no knowledge whatever that said insurance policy had been changed so as to name contingent beneficiaries, but the Veterans Administration did know of that fact and, in view of Mrs. Short's illness, said office should have acted promptly in passing on her claim.

10.

In reply to the aforesaid letter dated November 1, 1950, written to the Veterans Administration by the attorneys for Mrs. Short, a form letter dated November 17, 1950, was sent to said Ethel Grace Short at her residence at 1386 Euclid Avenue, Berkeley, California, which called attention to the fact that the claim submitted by Mrs. Short had not been signed and said letter also indicated that Mrs. Short should sign a claim on Form 8-355c and that on Form 8-150a she should indicate the type of settlement which she elected to have upon such claim. These forms were enclosed. Said letter of November 17, 1950, was the first indication that Mrs. Short had failed to regularly sign said claim as originally filed, although over a month had passed since such filing.

11.

With a letter dated November 24, 1950, Mrs. Short, through her attorneys, forwarded to the said Veterans Administration her new claim upon the aforesaid insurance policy, duly made out upon said Form 8-355c, and she also sent her so-called election

to receive payment of said policy in 36 equal monthly installments.

12.

Mrs. Short received a letter dated December 6, 1950, from Edward F. Witsell, Major General, United States of America, the Adjutant General, which was written in reply to her letter of October 5, 1950, and this letter definitely stated that it had been ascertained that on July 22, 1950, the State Department had sent a message to the Army in Japan saying that Irving Ritchie Short had expressed a desire to go to Japan for the purpose of requesting call to extended active duty and that on August 12, 1950, authority was granted for him to enter Japan and to travel by military transportation on a space available basis and that, therefore, his entry into Japan was for his own convenience and not in compliance with orders from the Army and that he had not been recalled to active service and that the Army could not reimburse her, Mrs. Short, for expenses incident to his death. This letter stated that the son's remains had been shipped to the United States aboard the U. S. N. S. General Gaffey, and that said vessel would arrive at Fort Mason, San Francisco, California, on or about December 12, 1950, and that as the shipment was on a space available basis, that would relieve Mrs. Short of cost of the transportation.

That from said letter of December 6th, 1950, hereinbefore referred to, it is clear that had the Veterans Administration requested the information

from the War Department, it could at once have ascertained that said Irving Short was not again in military service at the time of his death.

The fact was that, while claiming it must have such information, the Veterans Administration made no request upon the Army therefor until on or about April 23, 1951. If the matter was important, about four months' time was wasted.

13.

Under date of December 22nd, 1950, the Veterans Administration, in response to an inquiry from the attorneys for Mrs. Short, sent a form letter to Mrs. Short, which referred to her claim and which inserted crosses in a box opposite the printed statement, reading:

"This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

The following printed sentence was also checked:

"You will be further advised at the earliest possible date."

On January 18th, 1951, the attorneys for Mrs. Short wrote the Veterans Administration saying that Mrs. Short had heard nothing further in regard to the claim.

On February 21st, 1951, the attorneys for Mrs. Short sent to the Veterans Administration a similar letter.

Under date of March 5th, 1951, the Veterans Administration sent to said attorneys a form letter acknowledging the receipt of the two preceding letters and inviting attention to the printed language marked with crosses. This language was, in substance, the same as that hereinbefore mentioned in the prior form letters. This form letter last mentioned contained also the following:

> "Action on this claim is pending receipt of an official report of death from the Service Department."

Under date of March 31st, 1951, the attorneys for Mrs. Short wrote the Veterans Administration asking for the meaning of the expression last quoted. The attorneys for Mrs. Short were in a quandary as to what the Veterans Administration was trying to get, as it seemed utterly clear that Irving Short was dead and that the fact of his death had been accepted both by the War Department and by the State Department. Said attorneys believed that it was the fact of death that the Veterans Administration should have been concerned with. Said letter of March 31, 1951, contained the following:

"Your letter dated March 5, 1951, which was in response to our letter of February 18, 1951, certainly does not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

> " '6. Action on this claim is pending receipt

of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?

"Will you please let us know what is meant by the expression quoted?"

Said letter also contained the following:

"Harvey Short, his brother, was in Tokio when Irving Short arrived. The medical examination showed Irving had polio. He died very soon after this examination and while in the government hospital. Harvey wired his mother that the remains would be sent on by the Army. After considerable delay, a speed letter came from the State Department saying that Irving was not back in the service at his death and that Mrs. Short must send $500.00 to meet the expense of returning the body. We attended to the sending of this money, but we complained because it struck us that Irving was, for all practical purposes, serving his country when he died and we thought the argument made was very unjust. Weeks and weeks passed before the shipment occurred. After pleading for information, a letter dated December 6, 1950, finally came from the Adjutant General's Office to Mrs. Short. The letter stated that space for shipment of the remains on the General Gaffey had been arranged.

The funeral occurred here. Are you concerned

over proof of death? The son, Irving Short, is buried here.

Why cannot the mother be advised as to what is the real cause of this great additional delay, so that she can help in supplying any information that you may need?"

14.

Mrs. Short wrote a letter dated April 1, 1951, to the Veterans Administration complaining of the delay; that she reecived from the Veterans Administration a letter dated April 24, 1951, which read, as follows:

April 24, 1951.

Mrs. Ethel G. Short,
1386 Euclid Avenue,
Berkeley 8, California.

Dear Mrs. Short:

Reference is made to your letter of April 1, 1951, enclosing letter dated October 26, 1950, from Col. Washington M. Ives, Jr., Executive, General Headquarters, Far East Command, and letter dated September 11, 1950, from the Chinese Embassy, Washington, D. C.

Before settlement of the $10,000 National Service Life Insurance may be made to you as beneficiary of the above-named veteran, it is necessary under Veterans Administration regulation that there be of record proof of death of the above-named veteran. This office is endeavoring to obtain an official report of death from the Service Department, however, it

seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.

Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised.

Returned herewith are the letters you enclosed as requested.

Very truly yours,

R. J. HINTON,
Director, Dependents and Beneficiaries Claims Service.

The said letter last mentioned took the untenable position that proof of death of Irving Ritchie Short could be established only in some one particular way.

15.

Under date of April 24, 1951, the attorneys for Mrs. Short received an additional letter from the Veterans Administration which merely acknowledged on a form the receipt of the letter of March 31st, 1951.

16.

Under date of May 15th, 1951, the attorneys for Mrs. Short wrote a letter to the Veterans Administration stating their position, as follows:

"Of course, so far as this death claim is concerned, the material fact is that Irving R. Short is dead."

This letter called attention to the fact that the Prudential Life Insurance Company had paid an insurance policy on the life of the decedent and it accepted the death radiogram of August 31, 1950, as sufficient proof of death.

This letter pointed out that a death certificate had been obtained for the said Prudential Life Insurance Company, but was not eventually required as a condition of the paying of their policy.

With the said letter dated May 15th, 1951, the attorneys for Mrs. Short forwarded to the Veterans Administration the said physician's certificate.

The said letter of May 15, 1951, declared:

"Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert H. Brown & Co. We can supply you with proof of the burial."

The undertaker had also received a death certificate and an embalmer's certificate.

17.

On June 18, 1951, said Veterans Administration sent to the attorneys for Mrs. Short a letter, which letter recited that a report from the Army states that Irving Ritchie Short was not in active service at the time of his death and that a report of death was not available at "that office." The letter also contained the following:

"As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State Department. When this evidence is on file, prompt action will be taken on the claim."

That, as a matter of fact, said Veterans Administration received said army report about April 23, 1951.

18.

On June 20th, 1951, the attorneys for Mrs. Short wrote a letter to the said Veterans Administration, which opened with the statement:

"Mrs. Ethel G. Short died on June 14, 1951."

A copy of the letter last mentioned reads as follows:

June 20, 1951.

Veterans Administration,
Washington 25, D. C.

8BAAC.
Short, Irving R.
XC—16 522 204.

Attention: R. J. Hinton, Director, Dependents and Beneficiaries Claims Service.

Dear Mr. Hinton:

Mrs. Ethel G. Short died on June 14, 1951.

We are acting for her son, Harvey Short (James Harvey Short), who will attend to the probate of the estate of his mother, either personally or through his wife, Margaret D. Short.

As your department knows and as the State Department knows, the son, Irving R. Short, above mentioned, died on August 30, 1950. The payments upon the decedent's policy referred to above were not made to the mother, Mrs. Ethel G. Short, simply because your department did not know whether Irving R. Short was or was not in the Military Service at the time of his death. If he was in the Military Service, the War Department decided the fact of death. If he was not in the Military Service, the State Department decided the fact of death. You have never claimed that you could not settle the matter by taking proof from both departments.

You have now delayed until Mrs. Short is dead. The War Department was satisfied that Irving Short was dead. They sent a telegram to that effect.

You have a copy and you have a doctor's certificate that came from the hospital that ought to satisfy either department. The State Department was satisfied that the young man was dead. It sent letters to that effect and made Mrs. Short put up $500.00 to have the body shipped home for burial. They received and used the money for that purpose. After protracted delay, the War Department and the Navy Department had the body shipped on the U.S.N.S. General Gaffey and the burial was attended to here by Albert Brown and Company, the undertakers. So the War Department, the State Department, the Navy Department, and the undertaker, the doctor, and the relatives all know that the young man is dead, and yet payment to Mrs. Ethel Short was held up, and now she is dead. We do not believe your rules were designed to accomplish such injustice.

We understand that under the terms of the policy, which the War Department issued upon the life of Irving Short, the funds payable will now become payable to the brother, Harvey Short, also known as James Harvey Short.

(Page 2.)

Mrs. Short's husband was James Vernon Short. We attended to the probate of his estate. He died on March 3, 1945, leaving as his sole heirs at law his said wife and two sons, the said Irving R. Short and Harvey Short. The death of the son, Irving Short, occurred on August 30, 1950. He was unmarried at

the time of his death and left no issue. His mother was his sole heir and she was designated in the policy as the beneficiary.

Do you want proof of death of the father, and if so, what proof?

Do you want proof of death of the mother and if so, what proof?

As Major Harvey Short is home on leave from Korea and will have to go back to Korea very shortly, please advise us at once as to what proof we should supply to you in order to establish his rights under the insurance policy involved.

Kindly answer the following questions:

1. Who will get the payments that you should have paid to Mrs. Ethel Short up to January 14, 1951, the date of her death?

2. Will the past due payments have to be collected by the administratrix of Mrs. Short's estate?

3. Will the future payments be a part of the estate of Mrs. Ethel Short?

4. Will the future payments be payments to the surviving brother and will they be no part of the estate of Ethel Short?

Please send on any forms that have to be executed in order to obtain the benefits of this policy.

Before she died, Mrs. Short supplied to your local office in Oakland a statement in which she agreed to accept payments on the policy in a cer-

tain way. That statement has been sent on to your office. Please furnish us with a copy of the statement, as we failed to keep a copy.

As we understand, your department is a part of the War Department. Assuming that is true, did not the War Department determine that Irving R. Short was not in the service, when it forced Mrs. Short to pay to the State Department $500.00 for shipping the body of Irving R. Short home?

Why was not Mrs. Short supplied with some account that showed whether they had or had not used up her $500.00?

(Page 3.)

Mrs. Short was given to understand that as there was "available space" in the U.S.N.S. Gaffey, no freight charge would be imposed for the shipping of the body.

To what office should we send a communication on behalf of the estate of Ethel G. Short to find out whether the whole of the $500.00 was used up?

Kindly use air mail in reply.

We enclose air mail envelope for this purpose.

You sent back our air mail envelopes heretofore, but time is important in this matter and we wish you would please use the one sent herewith.

We have told you that we are willing to meet any expense necessary to your prompt handling of the matter, but you felt you should pay no attention to this. If you need money for telegrams or radiograms, please let us know.

We think this young man was willing to give his life to the service and yet the mother's claim was simply bogged down by your regulations and forms which are protecting no one.

Yours truly,

CLARK & MORTON,

By G. CLARK,

Attorneys for Harvey Short, and Attorneys for Estate of Ethel G. Short.

On July 11, 1951, the attorneys for Mrs. Short wrote a letter to the State Department, complaining of the delay connected with Mrs. Short's claim and explaining that Mrs. Short had died.

On December 26, 1951, said attorneys received a reply to the letter last mentioned which stated that a copy of the report of the death involved had been sent to the Veterans Administration on July 3, 1951. The first paragraph of said letter of December 26, 1951, read:

"The receipt is acknowledged of your letter dated July 11, 1951, concerning the death of Irving R. Short, which occurred on August 30, 1950, at Tokyo, Japan. You enclosed with your letter a copy of a letter from the Veterans Administration requesting an official report of the death of Irving R. Short, and in this connection, a copy of the report of death was sent to the Veterans Administration on July 3, 1951."

It took from July 11, 1951, to December 26, 1951, to get word from the State Department that they

had advised the Veterans Administration on July 3, 1951, that Irving Ritchie Short was dead.

Neither the attorneys for Mrs. Short or the members of the Short family were ever furnished with this report last mentioned. Nor is there any form prescribed for such a report, and no regulation required any such report. This was a death that could be proved in the simple ordinary way.

19.

That under date of July 11, 1951, the Veterans Administration sent to the attorneys for Mrs. Short a letter which acknowledged the receipt of their letter of June 20, 1951, and advised the said attorneys that nothing would be paid Mrs. Short under the said insurance policy, but that the amount payable under said policy would be paid to James Harvey Short, hereinbefore mentioned, and Berkshire Industrial Farm of Canaan, New York, as these two payees were named as contingent beneficiaries in the policy; that said letter stated:

"As the principal beneficiary died before receiving insurance benefits, the full amount of the insurance, including the monthly payments which should have been paid to Ethel Grace Short for the period from the date of the Veteran's death to the date of her death is payable to the contingent beneficiaries in the amounts designated by the insured."

The plaintiff alleges that the legal position last referred to is unsupportable—

(a) Because there was no reason for postponing the determination of the fact of Irving Short's

death until after the date of the death of his mother, which occurred on June 14, 1951.

(b) Because by the Insurance Act of 1946, the provision was taken out of the law that a beneficiary could acquire no right to payments under a National Service Life Insurance policy unless he was living and unless he actually received the payment in hand.

Plaintiff further alleges that if she, as administratrix of the estate of Ethel Grace Short, deceased, is not entitled to the monthly payments that accrued on said insurance policy up to June 14, 1951, then a proper construction of the Insurance Act of 1946 is that the whole amount unpaid on the policy hereinbefore mentioned was payable to the estate of the insured, to wit, the Estate of Irving Ritchie Short.

20.

That the Veterans Administration and the Director of Dependents and Beneficiaries Claims Service finally decided and determined on November 29, 1951, that the amounts payable on said policy were payable equally to James Harvey Short and Berkshire Industrial Farm.

That plaintiff and said James Harvey Short duly appealed from said determination to the Board of Veterans Appeals within sixty days from said decision and determination.

That on May 2, 1952, said Board affirmed the aforesaid ruling that had been made in said case.

That in the period for taking said appeal, there

was no administrator or legal representative of the estate of said Irving Ritchie Short, deceased. Mrs. Short had been the administratrix of the estate of said Irving Ritchie Short up to the time of her death on June 14, 1951, and thereupon the public administrator of Alameda County, California, became entitled to act as administrator of the estate of Irving Ritchie Short. That, however, said public administrator took no action to be appointed such administrator and waived his right in favor of James Harvey Short, who was thereupon appointed administrator of said estate and who now is the duly appointed, qualified and acting administrator of the estate of said Irving Ritchie Short, deceased.

In appealing the case referred to, said James Harvey Short did so as the holder of any and all rights created in his favor under said policy of insurance. That he set forth that said Irving Ritchie Short left no Will and that said Ethel Grace Short was the sole heir at law of said Irving Ritchie Short; that said Ethel Grace Short left no Will and that he, James Harvey Short, was the sole heir at law of said Ethel Grace Short; that there were no claims against the estates of said decedents and that he was entitled to the estates of said decedents. That such were the facts.

That this suit was begun only after exhausting all available administrative proceedings.

21.

That a dispute exists as between the plaintiff and the remaining defendants in this action as to the

proper construction and effect of said insurance policy and as to how the sums should be paid which are payable on the insurance policy herein mentioned and that the plaintiff is entitled to have declared and determined what rights she may have under the said insurance policy; that such a decree is necessary to a determination of this action.

22.

That the plaintiff has made parties to this action all persons who might have any claim to the proceeds of the insurance policy hereinbefore mentioned.

Wherefore, the plaintiff prays judgment declaring her rights and the rights of the defendants under said insurance policy and that plaintiff shall have judgment upon said policy for such of the 36 equal installments as had accrued thereon prior to June 14, 1951, and that the Court shall determine the rights of all persons under said policy and grant such other and further order as may be proper.

Dated: June 6, 1952.

/s/ GEORGE CLARK,
Attorney for Plaintiff,
Margaret D. Short.

CLARK & MORTON,

By /s/ GEORGE CLARK,
Also Attorneys for Plaintiff.

[Endorsed]: Filed June 6, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, one of the defendants above named, and answering Complaint of plaintiff on file herein, admits, denies, and alleges as follows:

1.

Answering paragraphs 1 and 2 of plaintiff's complaint, this answering defendant admits all the allegations therein contained save and accept that portion of paragraph 2 commencing on line 32, page 2, with the word, "Said" to and including the word "plaintiff" on line 4, page 3, and to this portion of said paragraph this answering defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained.

2.

Answering paragraphs 3, 4a and 4b, this answering defendant admits all the allegations therein contained.

3.

Answering paragraph 5 of plaintiff's complaint, this answering defendant admits all the allegations therein contained save and except that portion of paragraph 5 commencing on line 8, page 4, with the word, "That," to and including the word, "policy" on line 13, page 4, and that further portion of paragraph 5 beginning on line 25, page 4, with the word,

"It," to and including the phrase, "after June 14, 1951" on line 29, page 4, to which portions of paragraph 5, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

4.

Answering paragraph 6 of plaintiff's complaint, this answering defendant does not have sufficient information and belief as to the allegations therein contained from line 1, page 5, beginning with the word, "The," to and including the word, "treatment" on line 22, page 5, and basing its denial on such lack of information and belief denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof. Plaintiff admits all the rest of the allegations in paragraph 6 of plaintiff's complaint which have not been herein specifically.

5.

Answering paragraph 7 of plaintiff's complaint, this answering defendant admits all the allegations therein contained, save and accept that portion of paragraph 7 which begins on line 25, page 7, with the word, "That," to and including the word, "thereof," on line 3, page 8, and to that portion of paragraph 7, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

6.

Answering paragraphs 8, 9, 10, and 11 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained.

7.

Answering paragraph 12 of plaintiffs' complaint, this answering defendant does not have sufficient information or belief as to the allegations therein contained and basing its denial on such lack of information and belief denies generally and specifically, each and every, all and singular, the allegations therein contained and the whole thereof.

8.

Answering paragraph 13 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained.

9.

Answering paragraph 14 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained, save and except that portion of paragraph 14 which begins on line 31, page 12, with the word, "The," to and including the word, "way," on line 32, page 12, and to that portion of paragraph 14, this answering defendant denies generally and specifically, each and every, all and singular, the allegations therein contained.

10.

Answering paragraphs 15, 16, 17, and 18, this

answering defendant admits all the allegations therein contained.

11.

Answering paragraph 19 of plaintiffs' complaint, this answering defendant admits all the allegations therein contained, save and except that portion of paragraph 19 beginning with line 26, page 17, with the word, "The," to and including the word, "Short" on line 14, page 18, and as to those allegations, defendant denies generally and specifically, each and every, all and singular, the allegations therein contained.

12.

Answering paragraphs 20, 21, and 22, of plaintiffs' complaint, this answering defendant admits the allegations therein contained.

13.

As a second, separate, and distinct defense to plaintiffs' complaint, this answering defendant alleges that the alleged claim and dispute of the plaintiff herein is barred by the provisions of Section 802(u) of Title 38 U.S.C. which reads in part as follows:

"* * * and in any case in which * * * a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether ac-

crued or not) shall be paid in one sum to the estate of the insured: * * *."

Defendant alleges that plaintiff's decedent by the terms and provisions of the policy of insurance issued to Irving Ritchie Short under National Service Life Insurance was not entitled to a lump sum settlement.

14.

As and for a third, separate, and distinct defense to plaintiff's complaint, this answering defendant alleges that plaintiff herein and co-defendant James H. Short, as administrator of the estate of Irving Ritchie Short are barred from and not entitled to the proceeds of National Service Life Insurance policy 8-041-741 issued to Irving Ritchie Short, deceased, by virtue of the provisions of Section 8.91(b) of Title 38 C.F.R. which reads:

"If the principal beneficiary of National Service Life Insurance maturing on or after August 1, 1946, does not survive the insured or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in accordance with the provisions of § 8.77."

Defendant further alleges that the insurance policy which is the subject of the dispute of the above-entitled matter, matured after August 1, 1946, and further alleges that the principal beneficiary, Ethel Grace Short, deceased, was not entitled to a

lump sum settlement under the provisions of said policy and further alleges that Ethel Grace Short died before commencement of payment to her as principal beneficiary under the terms of the policy. Defendant further alleges that pursuant to the provisions of the designation of beneficiary executed by Irving Ritchie Short, deceased, on August 25, 1949, defendant, James Harvey Short, individually and defendant, Berkshire Industrial Farm of Canaan, New York, were designated as contingent beneficiaries of $5,000 each of the proceeds of said insurance policy and are entitled, pursuant to the provisions of Section 8.91(b) of Title 38 C.F.R. to the proceeds of the insurance policy, which is the subject of the above-entitled matter.

Wherefore, this answering defendant prays that plaintiff take nothing by its Complaint, that said Complaint be dismissed, that defendants be awarded its costs of suit herein incurred for such other and further relief as to this court may seem meet and proper in the premises.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Defendants.

[Endorsed]: Filed October 14, 1952.

[Title of District Court and Cause.]

ANSWER OF BERKSHIRE INDUSTRIAL FARM

Now comes the Defendant, Berkshire Industrial Farm, a corporation, one of the defendants named in the above-entitled action, and therein referred to as "Berkshire Industrial Farm of Canaan, New York," and answering the Complaint of the Plaintiff on file herein admits, denies and alleges as follows:

First Defense

1. This answering Defendant alleges that it is now and at all the times mentioned in this Answer or in the said Complaint it was a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, and as such, under the laws of the State of New York, duly authorized to take by gift personal property and hold the same for its proper purposes, and does now, and at all the times hereinafter in this First Defense mentioned, it did under the provisions of the Social Welfare Law of the State of New York, possess the general powers and was and is subject to the general restrictions and liabilities of incorporated charitable institutions (Book 52-A, "McKinney's Consolidated Laws of New York," Sec. 472-e). This answering Defendant alleges that it was sometimes known as "Berkshire Industrial Farm of Canaan, New York," and that on the first day of January, 1925, and prior thereto, and ever since that date it has

had and still has its principal place of business in Canaan in the State of New York.

2. Answering Paragraph 1 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of the last sentence of Paragraph 1 commencing on line 9, page 2, with the word "That," to and including the word "death" on line 11, page 2, and to this portion of said sentence this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

3. Answering Paragraph 2 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 2 commencing on line 32, page 2, with the word "Said," to and including the word "plaintiff" on line 4, page 3, and to this portion of said paragraph this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

4. Answering Paragraphs 3, 4a, and 4b, this answering Defendant admits all the allegations therein contained.

5. Answering Paragraph 5 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained save and except that portion of Paragraph 5 commencing on line 8, page 4, with the word "That," to and including the word

"policy" on line 13, page 4, and that further portion of Paragraph 5 beginning on line 25, page 4, with the word "It," to and including the word "forth" on line 31, page 4, to which portions of Paragraph 5 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof. This answering Defendant, further answering Paragraph 5 of the Plaintiff's Complaint, alleges and contends that the Estate of said Ethel Grace Short has no right under said policy, because Ethel Grace Short, was at no time entitled to a lump-sum settlement of the insurance owing on said policy, and prior to her death on June 14, 1951, she had failed to establish the death of her son with evidence that was satisfactory to the Veterans' Administration, or such as was required under its duly-adopted rules and regulations, and in particular such as was required under 38 C.F.R. 3.27, 3.30, 3.32, 8.52 (a), (b), (c), (d), (e) or (f), or any of them.

6. Answering Paragraph 6 of the Plaintiff's Complaint, this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments therein contained, which commence on line 2, page 5, with the word "The" and continue to and including the word "treatment" on line 22, page 5. This answering Defendant admits all the rest of the allegations in Paragraph 6 of the Plain-

tiff's Complaint which have not been denied as aforesaid.

7. Answering Paragraph 7 of Plaintiff's Complaint, this answering Defendant admits all the allegations contained therein save and except that portion of Paragraph 7 which begins on line 25, page 7, with the word "That" to and including the word "thereof" on line 3, page 8, and to that portion of Paragraph 7 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations contained therein, and the whole thereof. This answering Defendant, further answering Paragraph 7 of Plaintiff's Complaint, alleges that the physician's certificate referred to in Paragraph 7 of the Complaint was not executed under oath as required by 38 C.F.R. 3.30.

8. Answering Paragraph 8 of Plaintiff's Complaint, this answering Defendant admits all the allegations of facts therein contained.

9. Answering Paragraph 9 of Plaintiff's Complaint, this answering Defendant admits all the allegations of facts therein contained in the first paragraph thereof commencing with the word "Under" on line 26, page 8, to and including the word "days" on line 3, page 9, and this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments made in said Paragraph 9 of Plaintiff's Complaint in the last sub-

paragraphs thereof, commencing with the word "Thus" on line 4, page 9, and ending with the word "claim" on line 17, page 9.

10. Answering Paragraphs 10, 11, 12, and 13 of Plaintiff's Complaint, this answering Defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the averments therein contained.

11. Answering Paragraph 14 of Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained save and except that portion of Paragraph 14 which begins on line 31, page 12, with the word "The," to and including the word "way" on the last line below line 32 on page 12, and to that portion of Paragraph 14 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

12. Answering Paragraphs 15, 16, and 17 of Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained.

13. Answering Paragraph 18 of Plaintiff's Complaint, this answering Defendant admits the allegations therein on line 15, page 14, beginning with the word "Mrs." and ending with the figures "1951," and alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the other averments therein contained.

14. Answering Paragraph 19 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 19 beginning on line 26, page 17, with the word "The," to and including the word "Short" on line 14, page 18, and to that portion of Paragraph 19 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof.

15. Answering Paragraphs 20, 21, and 22 of Plaintiff's Complaint, this answering Defendant admits the allegations therein contained.

Second Defense

1. This answering Defendant alleges that the Complaint fails to state a claim against it or its co-defendants upon which relief can be granted.

Third Defense

This answering Defendant alleges as follows:

1. Plaintiff's decedent, Ethel Grace Short, was the first or primary or principal beneficiary of the policy of insurance in the sum of $10,000.00 and numbered 8 041 741, which is the subject of dispute in this action, and she was such at the time of the death of the insured thereunder, her son.

2. The said insured died in Tokio, Japan, on August 30, 1950.

3. The said insured at the time of his death was

not a member of the armed forces of the United States of America.

4. By a designation of beneficiaries executed by the insured on or about August 25, 1948, said Ethel Grace Short was designated as the first or primary or principal beneficiary of said policy of insurance, and James Harvey Short, her son, individually, and this answering Defendant were designated as contingent beneficiaries of said policy of insurance in the respective sums of $5,000.00 each, and said James Harvey Short, individually, and this answering Defendant, at the time of the death of said insured were such contingent beneficiaries.

5. By the terms and provisions of said policy of insurance, the insured thereunder had not elected or provided, nor had he ever elected or provided for a lump-sum settlement for his mother, Ethel Grace Short, for any insurance which might become payable to her; and said Ethel Grace Short was not entitled to a lump-sum settlement of such insurance.

6. The said Ethel Grace Short survived said insured but died later on June 14, 1951, and before payment of said insurance had commenced.

7. The said policy of insurance matured after August 1, 1946.

8. The said contingent beneficiaries of said policy of insurance, James Harvey Short and this answering Defendant, survived the insured and survived said Ethel Grace Short and are still surviving and in being.

9. The Veterans' Administration, since the death of said Ethel Grace Short, has decided that the two contingent beneficiaries of said policy of insurance are entitled to receive the said insurance in the respective sums of $5,000.00 each, and this decision was later affirmed before the commencement of this action by the Board of Veterans' Appeals.

10. All the facts recited above are admitted in the averments made in the Complaint of the Plaintiff on file in this action.

11. Under these facts so admitted, James Harvey Short, individually, and this answering Defendant, under the terms and provisions of said policy of insurance, were and are entitled to receive all of such insurance in equal shares as authorized by the provisions of Sec. 802(t) and Sec. 802(u) of Title 38 U.S.C., and by the provisions of 38 C.F.R. 8.91(b).

12. The said Ethel Grace Short, the claimant for said insurance, had the burden of proving her claim, and prior to her death she had presented no evidence of the death of the insured that was satisfactory to the Veterans' Administration or that met the reasonable standards required by their regulations, duly authorized by law, and in particular, 38 C.F.R. 3.27, 3.30, 3.32, 8.52(a), (b), (c), (d), (e) and (f).

13. This answering Defendant is now and at all the times hereinabove mentioned it was a corporation duly organized, created and existing under and

by virtue of the laws of the State of New York, and as such under the laws of the State of New York it was duly authorized to take by gift personal property and hold the same for its proper uses and purposes, and does now and at all the times hereinabove mentioned it did, under the provisions of the Social Welfare Law of the State of New York, possess the general powers and was and is subject to the general restrictions and liabilities of incorporated charitable institutions (Book 52-A "McKinney's Consolidated Laws of New York," Sec. 472-e, 472-f, 472-p, 472-q).

Wherefore, this answering Defendant prays that Plaintiff take nothing by her Complaint, that said action be dismissed, that Defendants be awarded their costs of suit herein incurred, that the decision of the Veterans' Administration as affirmed by the Board of Veterans' Appeals as alleged in said Complaint be approved by this Court, and for such other and further relief as to this Court may seem meet and proper.

Dated: May 29, 1953.

WRIGHT & LARSON,

By /s/ RANDELL LARSON,
Attorneys for Defendant,
Berkshire Industrial Farm.

[Endorsed]: Filed May 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JAMES HARVEY SHORT, INDIVIDUALLY AND AS ADMINISTRATOR

Comes now the defendant, James Harvey Short, appearing individually and as Administrator of the Estate of Irving Ritchie Short, deceased, and answers the Complaint on file herein and admits and alleges, as follows:

1.

Defendant alleges that he is the duly appointed, qualified and acting Administrator of the Estate of Irving Ritchie Short. That the decedent last named was also known as Irving R. Short and also known as Irving Short. That said Irving Ritchie Short was the same person whose life was insured under that certain National Service Life Insurance policy which is numbered 8-041-741 and which is dated February 15th, 1943, and which is described in Paragraphs 1, 2, and 3 of the Complaint herein.

That Irving Ritchie Short died on August 30th, 1950.

That Ethel G. Short, named in said insurance policy as the primary beneficiary thereof, died on June 14th, 1951, and that she, the said Ethel G. Short, was the mother of and the sole heir at law of said Irving Ritchie Short.

That the plaintiff herein is the duly appointed, qualified and acting Administratrix of the Estate of Ethel G. Short, deceased.

That the defendant, James Harvey Short, is the sole heir at law of said Irving Ritchie Short, deceased.

2.

Defendant hereby refers to the allegations of the Complaint herein which are numbered 1 to 22, inclusive, and he hereby admits all of the allegations of the complaint so referred to and he alleges the same to be true.

Wherefore, the defendant prays that judgment be entered herein declaring the rights of all the defendants in this case under the insurance policy mentioned and described in Paragraphs 1, 2, and 3 of the Complaint herein, and first that it shall be determined that the defendant, as Administrator of the Estate of Irving Ritchie Short, deceased, is entitled to the entire amount payable under the said policy of insurance and secondly that, if it is not so determined, then that it shall be determined that the estate of Ethel G. Short is entitled to payments on said claim in equal monthly installments in accordance with the claim described in Paragraph 11 of the Complaint, such payments to run from the death of Irving Ritchie Short, on August 30th, 1950, to the death of said Ethel G. Short on June 11, 1951, and that in any event said James Harvey Short is individually entitled to recover one-half of the amount of said policy not payable to the estate of said Ethel G. Short, deceased, and further that the Court shall grant such other relief as may be proper.

Dated: May 29th, 1953.

/s/ F. V. CORNISH,

Attorney for Defendant, James Harvey Short, Individually and as Administrator.

Duly verified.

Service of Copy acknowledged.

[Endorsed]: Filed June 1, 1953.

[Title of District Court and Cause.]

AMENDMENT OF ANSWER OF BERKSHIRE INDUSTRIAL FARM, DEFENDANT

Now comes the Berkshire Industrial Farm, a corporation, one of the Defendants in the above-entitled action, and, with the written consent of the Plaintiff herein, the adverse party, first had and obtained and filed herein, amends its Answer now on file in said action by amending the first sentence in paragraph 5 of its First Defense so that said first sentence shall hereafter read as follows, to wit:

"5. Answering Paragraph 5 of the Plaintiff's Complaint, this answering Defendant admits all the allegations therein contained, save and except that portion of Paragraph 5 commencing on line 8, page 4, with the word "That," to and including the word "policy" on line 13, page 4, and that further portion of Paragraph 5 beginning on line 25, page 4, with the word "It," to and including the word

"unreasonable" on line 29, page 4, to which portions of Paragraph 5 this answering Defendant denies, generally and specifically, each and every, all and singular, the allegations therein contained, and the whole thereof."

and so that the remainder of said paragraph 5 of its First Defense shall not be affected by this Amendment.

Dated: June 17, 1953.

WRIGHT & LARSON,

By /s/ RANDELL LARSON,

Attorneys for Said Defendant, Berkshire Industrial Farm.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1953.

[Title of District Court and Cause.]

STIPULATION OF FACTS AND FOR HEARING AND SUBMISSION OF CASE PURSUANT TO STIPULATION

It Is Stipulated by the parties to the above cause that the facts admitted by the pleadings and the facts hereinafter set out are true and that their rights depend upon and shall be determined by the Court therefrom. Should it appear that any fact admitted by the pleadings is at variance with a fact herein stipulated to, the admission of the pleadings shall be controlling.

It is not intended by this stipulation that the defendants admit to any legal conclusions which would estop them from denying the right of plaintiff or asserting the rights of defendants to the proceeds of the insurance policy referred to in the complaint.

The defendants reserve the right to object to any of the facts herein recited upon the grounds that such facts are not relevant, nor material to a decision in the case.

The facts stipulated to are as next set out.

Item 1:

Irving Ritchie Short was a veteran of World War II.

He died on August 30th, 1950.

Prior to his death he had been honorably discharged from the United States Army and he was not a member of the armed forces of the United States at the time of his death. At the time of his discharge from the army he had the rank of Captain.

He was sometimes referred to as Irving R. Short and sometimes as Irving Short.

Item 2:

At the time of the veteran's death, there was in effect upon his life a National Service Life Insurance Policy of $10,000.00, which policy is the basis of the claims of the respective parties to this case.

The policy became effective January 1, 1943.

A copy of said policy is set out in Paragraph 3 of the Complaint.

The policy designated Mrs. Ethel Grace Short, the mother of the insured, as principal beneficiary.

Mrs. Ethel Grace Short was sometimes referred to as Mrs. Ethel G. Short or as Mrs. Ethel Short or as Ethel Short. At times she is referred to herein as Mrs. Short.

Mrs. Short had one other son, who is still living and whose name is James Harvey Short. He is also known as James H. Short or as Harvey Short.

Item 3:

Before his death, the insured duly designated as equal contingent beneficiaries under said policy the following:

James Harvey Short, his brother, and Berkshire Industrial Farm of Canaan, New York.

Said James Harvey Short is still living.

Said Berkshire Industrial Farm of Canaan, New York, was and is qualified to be a contingent beneficiary under said insurance policy.

Item 4:

The insured did not make any election as to the manner in which a beneficiary receiving a payment of an amount under said policy should receive such payment.

Item 5:

Ethel G. Short died on June 14, 1951, which was before it was determined by the officials of the Vet-

erans Administration having authority to pass on her claim under said policy that her son, Irving Ritchie Short, was dead.

The plaintiff, Margaret D. Short, is the Administratrix of the Estate of said Ethel Grace Short, deceased. Letters of Administration on said estate were duly issued to said Margaret D. Short on July 3rd, 1951, and they are still in effect. She is the wife of James Harvey Short.

Item 6:

Said James Harvey Short is Administrator of the Estate of Irving Ritchie Short, Deceased. Letters of Administration on said estate were duly issued to said James Harvey Short on April 10, 1952, and they are still in effect.

Item 7:

Said Ethel Grace Short was the sole heir at law of the son, Irving Ritchie Short.

And James Harvey Short is the sole heir at law of his mother, Ethel Grace Short.

Both the son and the mother died intestate. No distribution has occurred in either estate and no order has been made in either estate purporting to affect any right under said insurance policy.

Item 8:

As stated, said Irving R. Short died on August 30, 1950. He died in a United States Army Hospital in Tokio, Japan, in which hospital he was at the time receiving medical treatment for polio. He had

been hospitalized and placed in said hospital under the following circumstances:

On the outbreak of hostilities in Korea, he had gone from Formosa to Tokio and he had there duly applied to enter again into active service in the army in Tokio. This required a medical examination by the army authorities in Tokio. This was duly arranged for. On the making of this examination, it was ascertained by the physician making the examination that the applicant was seriously ill; that his symptoms indicated that he had polio and that he required immediate hospitalization and medical treatment. His brother, James Harvey Short, who was in the army and was in Tokio on the way to Korea at the time, was advised as to his brother's condition. It was at once agreed that necessary medical treatment of the applicant could be provided in Tokio only in one of the hospitals then being maintained by the United States Army in Tokio. The army authorities at once permitted the placing of the applicant in an army hospital, where he was treated by the physicians in charge up to the time of his death. The patient grew rapidly worse and he died from polio within a few days after entering the hospital.

The army immediately sent to the mother, Ethel G. Short, a telegram addressed to her home at 1386 Euclid Avenue, Berkeley, California. This telegram was dated August 30, 1950, and was delivered on August 31, 1950. It was in the form employed by the United States Army in giving notice to parents

of the death of a son, who dies when in the service. It read, as follows:

1950, Aug. 31, P.M.
San Francisco, Calif., 31, 350P.

OA522.
O.SFC853 Govt. PD-WUX.

Mrs. Ethel M. Short,
1386 Euclid Ave., Berkeley, Calif.

From AGAO-C Signed Witsell the Adjutant General the Secretary of the Army Regrets to Inform You That Your Son Irving R. Short Died 30 August in Tokyo Japan PD He Was Hospitalized in Tokyo on 26 August Seriously Ill With Poliomyelitis PD My Sympathy Is With You in Your Bereavement.

THE ADJUTANT GENERAL,
Washington D. C., 3120572.

The son, Harvey Short, requested that the body of the applicant should be shipped home to Berkeley, California. Thereupon the officials of the Department of the Army who attended to such matters raised the question as to whether they could have anything to do with shipping the body and whether the shipping of the body could be at government expense. It was determined that the shipping could not be a governmental expense and the matter of arranging for the payment of this expense was referred to the State Department. Thereupon the State Department wrote to the mother, Ethel Short, what was called a speed letter, which stated that

since the sending of the telegram of August 30, 1950, hereinbefore mentioned, the army had definitely established that the decedent, Irving R. Short, was not a member of the armed forces at the time of his death and that as a result, the matter of preparing and shipping Irving Short's body had been referred to the State Department and that as American Consular offices did not have funds for the preparation and disposition of remains of private American citizens, Mrs. Short would have to provide the expense of preparation and shipment of her son to the United States for interment and that she should send a draft in the sum of $400.00, payable to the Secretary of State, to meet expenses and should give the name and address of the undertaker who would receive the body. The following is a copy of said speed letter:

Department of State
Washington 25, D. C.
Speedletter

Sept. 20, 1950.

Date September 20, 1950.

Speedletter to:
Mrs. Ethel Short,
1386 Euclid Avenue,
Berkeley, California.

Reference is made to the telegram sent to you by the Department of the Army on August 31, 1950,

informing you of the death of your son Irving R. Short on August 30, 1950, in Tokio, Japan. The Department of the Army has made a thorough investigation of its records, both in the United States and Japan, and it has been definitely established that Mr. Short was not a member of the Armed Forces at the time of his death, and as a result the matter has been referred to this Dept. for final disposition of the remains.

You will understand of course that American consular officers do not have the funds for the preparation and disposition of the remains of private American citizens who die within their consular jurisdiction. Therefore it will be necessary for you to make a deposit with the Dept. to cover any expenses incurred in connection with the preparation and eventual disposition of the remains. If it is your desire to have your son's body returned to the U. S. for interment, it is suggested that you forward to this Dept. a certified check, bank draft or postal money order for $500, payable to the Secretary of State of the U. S. It will be necessary also for you to furnish also the name and address of the undertaker to whom the remains are to be consigned. On the other hand if it is your desire that the remains are to be interred locally, the Department will request the appropriate American conselor officer in Japan to obtain estimate of such costs for submission to you. Any unexpended balance of your deposit will be returned to you; however if the ex-

penses exceed the amount of your deposit, an additional deposit will be required.

The Dept. will appreciate a prompt attention to this matter.

Sincerely yours,

For the Secretary of State:

FRANCIS E. FLAHERTY,
Assistant Chief, Division of
Protective Services.

By air-mail letter dated September 23, 1950, said Ethel G. Short sent the $400.00 in compliance with the aforesaid speed letter. This air-mail letter instructed that the undertaker who would receive the body would be Albert M. Brown & Co., an Oakland undertaker. The State Department thereupon shipped the remains of Irving R. Short to the Presidio in San Francisco, California. The body was shipped aboard the United States ship, the General Gaffey. It was buried in Berkeley by the Oakland undertaker, Albert M. Brown & Co., the funeral services being held in Berkeley, California.

Item 9:

About September 15, 1950, said Ethel Grace Short ascertained that her son, Irving Ritchie Short, had procured the insurance policy hereinbefore mentioned. However, she was unable to find the policy itself. On or about the date last mentioned, she phoned to the District Office of the Veterans Administration, in Oakland, California, about the pol-

icy and she was advised to call at said office and bring the telegram dated August 30, 1950, which is hereinbefore mentioned and which in the Complaint is referred to as a radiogram. She was advised that if the policy was lost, that would not affect the claim. A relative of Mrs. Short then called at the said office and was provided with a form of an insurance claim under said policy. This claim was filled out by Mrs. Short and, together with said telegram, was left at the Oakland office on or about September 25, 1950. Said Oakland office had the number of the insurance policy referred to.

Item 10:

On or about October 18, 1950, Mrs. Short received from said District Office a post card stating that the files regarding said claim had been forwarded to the Central Office of the Veterans Administration in Washington, D. C.

Said files included the original of said telegram.

Item 11:

Near the end of October, 1950, Mrs. Short employed Clark & Morton, attorneys at law, having offices in Berkeley, California, to aid her in attending to her claim upon the policy.

Item 12:

Under date of November 1, 1950, said attorneys, acting for Mrs. Short, wrote the Veterans Administration in Washington, D. C., stating that, according to the post card received by Mrs. Short, the

records relating to her claim had been sent to the Central Office of the Veterans Administration in Washington.

This letter also explained that at the outbreak of the Korean War, the insured, Irving Ritchie Short, had gone from Formosa to Tokio to again enter into the service of the United States Army and that on taking his medical examination, he was found to be afflicted with polio and was placed in the United States Army Hospital in Tokio, Japan, for treatment, where he died within a few days.

This letter from the attorneys stated that Mrs. Short was not well and it requested that her claim should be given special attention.

At this time Mrs. Short did not know that the policy of insurance had been changed or supplemented so as to specify as beneficiaries the contingent beenficiaries hereinbefore mentioned, Item 3.

Item 13:

The Veterans Administration, in reply to the letter from the attorneys last mentioned, sent a letter dated November 17, 1950. This letter was sent to Mrs. Short and called attention to the fact that the claim which she submitted had not been signed. The letter stated, in substance, that Mrs. Short should sign a claim on what is known as Form 8-355-C, a copy of which was enclosed, and that on Form 8-150-a, copy of which was enclosed, she should indicate the type of settlement which she elected to have upon such claim.

Item 14:

These forms were promptly filled out by Mrs. Short and signed by her and they were forwarded to the Veterans Administration, Washington, D. C., Attention of R. J. Hinton, Director, Dependents and Beneficiaries Claims Service, with a letter from Mrs. Short's attorneys dated November 24, 1950.

Neither Mrs. Short nor her attorneys were advised of any objection to the form of contents of the claim last mentioned.

Item 15:

The statement signed by Mrs. Short as to the payments which she desired to have made to her under the policy declared that she desired that these payments should be made in 36 equal monthly installments, but that payment should be made as much more rapidly as was permissible.

Item 16:

Mrs. Short found the insurance policy hereinbefore referred to and on October 9, 1950, it was promptly mailed to the Veterans Administration, Washington, D. C., with an air mail letter sent by Mrs. Short's attorneys.

Item 17:

Mrs. Short wrote a letter dated October 5, 1950, to the Adjutant General of the United States Army, wherein she claimed that the expense of shipping home the remains of her son, Irving Ritchie Short, should not have been inflicted upon her; that she

understood that he had gone from Formosa to Tokio under an order issued by the War Department. She urged that he was in or was virtually in the service before he died.

Under date of December 6, 1950, Edward F. Witsell, Major General, U. S. A., then Adjutant General, wrote Mrs. Short in response to the letter last mentioned, stating that Irving Short had not reentered the United States Army at the time of his death and that there was no authority for the Department of the Army to reimburse Mrs. Short for expenses incurred incident to his death. This letter concluded with the following statement:

"Your son's remains are being returned to the United States aboard the U. S. N. S. General Gaffey, which departed from Yokohama, Japan, on December 2, 1950, and is scheduled to arrive at the San Francisco Port of Embarkation, Fort Mason, California, on or about 12th December, 1950. His remains were shipped on space available basis which will relieve you of paying the cost of ocean transportation."

Item 18:

Under date of December 22, 1950, the Veterans Administration, in response to an inquiry from the attorneys for Mrs. Short relative to her claims, sent a letter to said attorneys, which was upon a printed form and which contained the following:

"This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

The following printed sentence was also checked:

"You will be further advised at the earliest possible date."

Item 19:

On January 18th, 1951, the attorneys for Mrs. Short wrote the Veterans Administration saying that Mrs. Short had heard nothing further in regard to the claim.

On February 21st, 1951, the attorneys for Mrs. Short sent to the Veterans Administration a similar letter.

Under date of March 5th, 1951, the Veterans Administration sent to said attorneys a form letter acknowledging the receipt of the two preceding letters and inviting attention to the printed language marked with crosses. This language was, in substance, the same as that hereinbefore mentioned in the prior form letters. This form letter last mentioned contained also the following:

"Action on this claim is pending receipt of an official report of death from the Service Department."

Item 20:

Under date of March 31, 1951, the attorneys for Mrs. Short mailed a letter to the Veterans Administration containing the following:

"Your letter dated March 5, 1951, which was in response to our letter of Feb. 18, 1951, certainly does

not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

> "'6. Action on this claim is pending receipt of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?"

Item 21:

Mrs. Short herself mailed a letter to the Veterans Administration dated April 1, 1951, and she received a reply to this letter dated April 24, 1951, reading as follows:

April 24, 1951.

Mrs. Ethel G. Short,
1386 Euclid Avenue,
Berkeley 8, California.

Dear Mrs. Short:

Reference is made to your letter of April 1, 1951, enclosing letter dated October 26, 1950, from Col. Washington M. Ives, Jr., Executive, General Headquarters, Far East Command, and letter dated September 11, 1950, from the Chinese Embassy, Washington, D. C.

Before settlement of the $10,000 National Service Life Insurance may be made to you as beneficiary of the above-named veteran, it is necessary under Veterans' Administration regulation that there be

of record proof of death of the above-named veteran. This office is endeavoring to obtain an official report of death from the Service Department, however, it seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.

Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised.

Returned herewith are the letters you enclosed as requested.

Very truly yours,

R. J. HINTON,

Director, Dependents and Beneficiaries Claims Service.

Item 22:

In a letter dated May 15, 1951, mailed to the Veterans' Administration, the attorneys for Mrs. Short stated:

"We are writing you again on behalf of Mrs. Ethel G. Short."

This letter explained that the attorneys had been endeavoring to help Mrs. Short obtain action upon her claim. This letter contained the following:

"Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert M. Brown & Co. We can supply you with proof of the burial."

This letter last referred to, dated May 15, 1951, also contained the following:

"In fairness to Mrs. Short, it appears that action on this claim is bogged down by a purely technical question of procedure and, as we construe your letter, a decision must first be reached as to whether Irving Short was in the military service, and then apparently the question of some type of follow-up proof as to death must originate out of the War Department, but if it is determined that Irving R. Short was not in the military service, then the proof of death must be supplied by the State Department. Of course, so far as this death claim is concerned, the material fact is that Irving Short is dead."

Item 23:

With the said letter, dated May 15, 1951, the attorneys for Mrs. Short mailed to the Veterans' Administration a Certificate executed by the physician of the Army Hospital, where Irving Short died. The form for this certificate had been procured by Mrs. Short from the Prudential Insurance Com-

pany of America, as it was thought that the company last mentioned would require a physician's certificate as a part of the proofs of death upon a policy which the decedent was carrying in said company in favor of his mother. Said company, however, accepted a copy of the telegram of August 30, 1950, as proof of death. A copy of this Certificate is as follows:

Proofs of Death—Physician's Statement
to Be Obtained by Claimant

The Prudential Insurance Company of America

Full Name of Insured: Short, Irving R.

Home Address: 1386 Euclid Avenue, Berkeley, California.

Immediate Cause of Death: Poliomyelitis, anterior, acute, paralysis of arms, spinal, legs, abdomen and neck.

Duration: 26 August, '50, to 30 August, '50.

Date of Death: August 30, 1950.

Date of Birth or Age Attained at Death: 28.

Place of Death (If Hospital or Institution, Give Name): 361st Station Hospital, APO 1055.

Date of First Treatment for Last Illness: 26 August, '50.

Date of Last Treatment: 30 August, '50.

I hereby Certify that the Information in this

statement is Complete and True to the best of my knowledge and belief.

Signature:

ROBERT S. CHESTNUT, M.D.,
(Or Robert S. Chestreet),
(Illegible Signature),

361st Station Hospital, APO 1055, c/o PM, San Francisco, California.

This physician's certificate was not executed under oath as required by 38 C.F.R. 3.30. (Code of Federal Regulations.)

Neither Mrs. Short or her attorneys were advised of any objection to the form of said certificate. They did not supply to the Veterans Administration information in support of the claim of Mrs. Short other than as shown by this stipulation or the admissions of the pleadings.

Item 24:

On June 18, 1951, said Veterans Administration sent to the attorneys for Mrs. Short a letter, which letter recited that a report from the Army states that Irving Ritchie Short was not in active service at the time of his death and that a report of death was not available at "that office."

The letter also contained the following:

"As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State

Department. When this evidence is on file, prompt action will be taken on the claim."

Item 25:

On June 14, 1951, Mrs. Short died, and, on June 20, 1951, the attorneys mailed a letter to the Veterans Administration advising them of that fact.

Item 26:

On July 3, 1951, the State Department sent to the Veterans Administration an official report of the death of said Irving Ritchie Short.

Item 27:

By letter, dated July 11, 1951, the Veterans Administration advised the attorneys for Mrs. Short as follows:

"As the principal beneficiary died before receiving insurance benefits, the full amount of the insurance, including the monthly payments which should have been paid to Ethel Grace Short for the period from the date of the Veteran's death to the date of her death is payable to the contingent beneficiaries in the amounts designated by the insured."

This decision of the Veterans Administration was appealed by plaintiff to the Board of Veterans Appeals, which Board, on May 2, 1952, affirmed the decision.

Item 28:

Before this suit was filed, the proceedings mentioned in Paragraph 20 of the Complaint occurred. The allegations of said paragraph and of Paragraph 21 of the Complaint are true.

Item 29:

The allegations of Paragraph 4a, as to the residences of the parties therein referred to, are true.

Dated: April 8th, 1954.

CLARK & MORTON,

By /s/ GEORGE CLARK,
GEORGE CLARK,

Attorneys for Plaintiff, Margaret D. Short, as Administratrix of Estate of Ethel Grace Short, Deceased.

/s/ FRANK V. CORNISH,

Attorney for Defendant, James Harvey Short, Individually and as Administrator.

/s/ RANDELL LARSON,
Attorney for Defendant,
Berkshire Industrial Farm.

[Endorsed]: Filed April 19, 1954.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Murphy, D. J.

This is an action contesting a Veteran Administration's ruling concerning the disposition of the proceeds of a National Service Life Insurance policy. Jurisdiction is invoked under Section 14 of the Insurance Act of 1946.[1]

---

[1]All footnotes appear in Appendix.

The facts were stipulated. They need be set out only briefly. Irving Short died in Japan on August 30, 1950. He had in effect a Ten Thousand Dollar ($10,000) policy of National Service Life Insurance. His mother, Ethel Short, was the principal beneficiary. She was not entitled to a lump-sum payment of the proceeds. Harvey Short, Irving's brother, and Berkshire Industrial Farm of Canaan, New York, were equal contingent beneficiaries. On September 25, 1950, Mrs. Short filed claim with the Veterans' Administration for the proceeds of the policy. Mrs. Short died on June 14, 1951. The Veterans' Administration did not receive the report of death of the insured it required from the State Department until July 3, 1951. Mrs. Short and her attorneys had previously sent to the Veterans' Administration a telegram which she had received from the Adjutant General, Department of the Army, Washington, D. C., stating that her son, Irving, was dead. They had also sent a certificate which was accepted by the Prudential Life Insurance Company for payment on that company's policy on Irving's life.

On November 29, 1951, the Veterans' Administration, through the Dependents and Beneficiaries Claims Service, ruled that the estate of Mrs. Short, the principal beneficiary, was entitled to no part of the proceeds and that the contingent beneficiaries were each entitled to one-half. This ruling was affirmed by the Board of Veterans' Appeals. Suit was brought by the estate of Mrs. Short joining the

United States, the estate of the insured and the two contingent beneficiaries as defendants.

It is clear that had the insured died prior to August 1, 1946, the ruling of the Veterans' Administration would be correct.[2] The National Service Life Insurance Act of 1940 provided explicitly in Section 602 (i), (j) and (k) that: (a) The right of any beneficiary to payment of any installments shall be conditioned upon being alive to receive them; (b) No person shall have a vested right to payment; and (c) No installments shall be paid to the heirs or legal representatives of the insured or of any beneficiary.[3] But important and far-reaching changes applicable to insurance maturing after August 1, 1946, were made by the Insurance Act of 1946.[4]

The restrictions on the permissible classes of beneficiaries were removed.[5] Lump-sum settlements were made available to beneficiaries at the option of the insured.[6] Sections 602 (i), (j) and (k) were amended by adding after each section:

> "The provisions of this subsection shall not be applicable to insurance maturing after [August 1, 1946]."[7]

A new subsection, 602 (u), was added[8] which in turn was amended in 1949,[9] so that as that section applies to this policy it reads:

> "With respect to insurance maturing on or subsequent to August 1, 1946, in any case in which the beneficiary is entitled to a lump-sum

> settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable under such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured, or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured: Provided, That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat."[10]

The Veterans' Administration, pursuant to its general rule making authority under the Act,[11] promulgated the following regulation:

> "If the principal beneficiary of National Service Life Insurance maturing on or after August 1, 1946, does not survive the insured <u>or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in</u> accordance with the provisions of Sec. 8.77. (Emphasis added.)[12]

This regulation specifically covers the case before me. Its effect is critical. Although the problems of the scope of review of Administrative regulations have plagued the courts; here, the Veterans' Administration ruling is made expressly reviewable.[13] There is no question of fact involved. The problem is solely one of law. Nor does the legal question require any special administrative experience or technical proficiency.

The problem of whether this regulation is legislative or interpretive, and the incident problems of my power to review its correctness, is solved by United States v. Zazove, 334 U. S. 602, 68 Sup. Ct. Rep. 1284 (1948). The Supreme Court there read a 1946 Amendment[14] designed to eliminate the finality of the decisions of the Veterans' Administration[15] as "indicative of Congressional concern that the regulations of the Veterans' Administration be subject to more than a casual judicial scrutiny when they are based upon a controverted construction of the statute."[16] Such regulations are "not automatically to be deemed valid merely because not plainly interdicted by the terms of the particular provisions construed."[17]

The Veterans' Administration regulations involved in Zazove were reviewed as if the regulations were interpretive. They more closely approached legislative regulations than the regulation involved in this case.[18]

Accordingly, I have carefully examined the statute as a whole, its historical setting and pur-

pose and its legislative history with a view toward testing the validity of the regulation. I recognize that ascertaining legislative intent[19] is not an easy problem and that "he who supposes that he can be certain of the result, is the least fitted for the attempt."[20] Nevertheless, this is a judge's function and duty. The result is important in administering National Service Life Insurance.

The statute must take meaning from its historical setting.[21] War risk insurance legislation has a long history extending continuously from the First World War to the present date. The provisions of the various Acts are set out in U. S. v. Henning, 344 U. S. 66, 71, 72 and need not be repeated here except to state that the Acts show a clear pattern of Congressional policy: Statutes enacted in war crises narrow the range of beneficiaries and put stringent limitations on the rights of estates to take. Peace-time legislation broadens both the class of permissible beneficiaries and the rights of estates to take.

The purpose of the 1946 Amendment was to place National Service Life Insurance on a peace-time basis;[22] to remove restrictions placed in the 1940 Act which drastically limited payments of insurance proceeds because of the added war-time hazards.[23] With the war-time hazards ended, the Insurance Fund was to be like that of other Mutual Companies.[24] National Service Life Insurance was to conform more readily with the provisions of commercial insurance.[25]

With this general purpose behind us—what does Section 602(u) provide?

Read with complete literalness the proceeds of the insurance go to the estate of the insured. "A designated beneficiary not entitled to a lump-sum settlement (Ethel Short) [died] before receiving all the benefits due and payable." But this reading of the statute would exclude the possibility of a contingent beneficiary taking anything after the death of the principal beneficiary. The statute does not require this result. Let us look at the legislative history of the Act. Whatever the present inviolability of the plain meaning rule[26] the statute is not so clear as to render an inquiry into the legislative history unnecessary. The three contingencies upon which the estate of the insured takes are quite reasonably read as covering situations where no beneficiary is alive to take the remaining proceeds of insurance. While the act does not specifically set out the right of contingent beneficiaries, Section 602(t)[27] speaks of payment to the "first beneficiary." This implies the possible existence of a second. The 1940 Act was construed as recognizing the right of a contingent beneficiary to take after the death of the principal beneficiary.[28] I find nothing in the 1946 Act which would indicate that this result was meant to be changed.

The legislative history of the 1949 Amendments to Section 602(u) makes it clear that the section was not intended to place the unpaid balance in the estate of the insured when there were contingent beneficiaries still living.[29]

This brings us to the question of whether the estate of the principal beneficiary is entitled to those payments which accrued[30] during her lifetime but which were not paid, as against the claims of the contingent beneficiaries. The question is whether the Act requires, as to insurance matured after August 1, 1946, that the principal beneficiary be alive in order to receive payment as against the contingent beneficiaries.

I take it as self-evident that the provisions of Section 602 (i), (j) and (k) do not require it. They are expressly inapplicable to this policy. Nor do I find any other provision in the 1940 Act which would require it. The Veterans' Administration ruling that Mrs. Short's estate could not take because "*the National Service Life Insurance Act of 1940* provides that * * * the designated beneficiary has no vested rights in the proceeds until receipt thereof,"[31] is not sound if based, as it apparently is, on the 1940 Act. (Emphasis added.)

Does Section 602(u) preclude payment to Mrs. Short's estate? I think not. The legislative history of the 1946 Amendment shows clearly that Section 602(u) was designed to cover only the final disposition of insurance not paid to a designated beneficiary.[32] Under the 1940 Act if no beneficiary within the permitted class was alive to receive payment, the unpaid balance reverted to the Treasury.[33] This provision together with the limited class of permitted beneficiaries was designed to limit the

payments, increased by war-time hazards, to those who were likely to be dependent upon the insured or to whom the insured owed some moral obligation.[34] They were removed from the 1946 Act and subsection (u) substituted[35] to govern the payment of the unpaid balance of insurance which was payable in installments.[36]

Subsection 602(u) was not meant to be exclusive of all receipt of payments by estates. If it were, as to beneficiaries entitled to a lump-sum settlement, their estates could take only if such beneficiary "elected some other mode of settlement and [died] before receiving all the benefits due and payable." If a beneficiary did not so elect, and Section 602(u) were exclusive of payments to estates, no payment would be made. The other provisions of 602(u) are inapplicable. But, the clear purpose in placing 602(u) in the Act was to abrogate the result under the 1940 Act, where if no beneficiary was alive to receive payment, the insurance remained unpaid and reverted to the Treasury.[37] The Veterans' Administration regulations provide that in this situation the unpaid balance is payable to the beneficiary's heirs.[38]

The 1949 Amendments to Section 602(u) which added the words, "whether accrued or not," after the words, "remaining unpaid insurance," does not preclude the estate of the beneficiary taking as against the contingent beneficiaries.

The purpose of the Amendment was "to make it clear that as to insurance maturing on or after

August 1, 1946, in cases where the beneficiary could not have elected to receive in a lump-sum settlement, any accrued installments on such insurance not paid to such beneficiary during his lifetime shall be paid to the estate of the insured rather than "to the estate of the beneficiary."[39]

I have been unable to discover, and counsel have not cited any other portion of the 1946 Act or any legislative history which would require or infer that the principal beneficiary must be alive to take as against contingent beneficiaries.[40]

What is there to be said on the other side? The restrictions on payments to estates found in Section 602 (i), (j) and (k) of the 1940 Act were expressly removed. They were removed because they related to a system which assumed at government expense the hazards of war-time deaths and in which payments were limited to a restricted class of beneficiaries. "Such provisions would not be in conformity with the disposition of insurance, payment of which is not limited to a restricted class of beneficiaries."[41] Within the general purpose of the 1946 Act, to conform with commercial insurance as far as possible, the Congressional concern with payments to estates was removed. Installment payments remaining unpaid were specifically payable to estates.[42]

I cannot believe that Congress intended that the rights of the principal beneficiary could be defeated by an administrative failure to pay or by litigation over the proceeds extending beyond that

beneficiary's death. This idea of elementary justice is not, as is contended by both defendants, removed as it applies to the construction of this Statute by U. S. v. Henning. It is true that Henning held that under the 1940 Act a beneficiary must be alive to take, and that delay in payment, whether attributed to administrative inaction or litigation, would not change the result. But this result was wholly based on the explicit provisions of Section 602 (i), (j) and (k) and the Congressional pattern of drastically restricting the rights of beneficiaries to take in war-time. Both these reasons have disappeared. Sections (i), (j) and (k) explicitly do not apply. The war-time policy has been reversed.

It is persuasive that even under the strict language of the 1940 Act,[43] both circuits which considered the problem[44] two Justices of the Supreme Court[45] and District Judge Wysanski[46] held that the estate of the beneficiary could take these installments which accrued prior to the beneficiary's death. The three District Courts which held to the contrary did so on the basis of Section (i), (j) and (k) alone.[47] Under the 1919 Act—war-time legislation—the estate of the beneficiaries took payments which accrued prior to the beneficiaries' death.[48]

I hold that under the 1946 Act, as amended, the estate of Mrs. Short is entitled to those unpaid installments which accrued prior to her death and that the contingent beneficiaries share the balance equally.

The facts stipulated between the parties and this memorandum opinion will constitute the findings of fact and conclusions of law required under Rule 52(a). Let a draft of a judgment embodying this decision be submitted in accordance with the local rule.

Dated: August 10th, 1954.

/s/ EDWARD P. MURPHY,
United States District Judge.

Appendix

[1]60 Stat. 788, 789 (1946); 38 U.S.C. 817.

[2]U. S. v. Henning, 344 U. S. 66 (1952); Baumet v. U. S., 344 U. S. 82 (1952).

[3]54 Stat. 1010 (1940); 38 U.S.C. 802 (i), (j) and (k).

[4]Pub. L. No. 589, 79th Cong., 2d Sess. (August 1, 1946); 60 Stat. 781, et seq. (1946).

[5]Id. at Sec. 4; 60 Stat. 782 (1946).

[6]Id. at Sec. 9; 60 Stat. 785, 786 (1946).

[7]Id. at Sec. 5(b); 60 Stat. 783 (1946).

[8]Id. at Sec. 9; 60 Stat. 786 (1946).

[9]Pub. L. No. 69, 81st Cong., 1st Sess. (May 23, 1949); 63 Stat. 74, 75 (1949).

[10]38 U.S.C. 802(u).

[11]38 U.S.C. 808, 60 Stat. 788 (1946).

[12]Sect. 10:3941, V. A. Regulations, 13 Fed. Reg. 2584, May 19, 1948; Now, 38 Code Fed. Regs. Sec. 8.91(b).

[13]38 U.S.C. 808, 60 Stat. 788 (1946).

[14]Pub. L. No. 589, 79th Cong., 2d Sess. Sec. 12 (August 1, 1946); 60 Stat. 788 (1946).

[15]Sen. Rep. 1705, 79th Cong., 2d Sess. 9 (1946); H. R. Rep. 2202, 79th Cong. 2d Sess. 10 (1946). See U. S. v. Zazove, 334 U. S. 602, 611, 612, 168 Sup. Ct. Rep. 1284, 1288 (1948).

[16]U. S. v. Zazove, Id. at 612, 68 S. Ct. Rep. at 1288.

[17]Id. at 611, 68 Sup. Ct. Rep. at 1288.

[18]The distinction between legislative and interpretative rules is not always clear. Here the V. A. rule making power extend to rules "Not inconsistent with the provisions of the Act" and "necessary and appropriate to carry out its purpose." Sec. 608 of N.S.L.I. Act. of 1940; 54 Stat. 1012, 1013 (1940); 60 Stat. 788 (1946); 38 U.S.C. 808. The validity of regulations promulgated under this section depend in large part on whether they properly interpret the Act.

[19]A Judge's function in looking for "legislative intent" or indeed if it is ever ascertainable is subject to much controversy. Compare: Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930) with Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930). See Sparkman, Legislative History and Interpretation of Laws, 2 Ala. L. Rev. 189 (1950). It is at least a short way of describing one process of interpreting Statutes. I use the words in that sense.

---

[20]Judge Learned Hand in U. S. v. Klinger, 199 F. 2d 645, 648 (2d Cir., 1952). See U. S. v. Henning 344 U. S. 66, 79 (1952), dissenting opinion.

---

[21]U. S. v. Henning, 344 U. S. 66 (1952); U. S. v. Zazove, 334 U. S. 602 (1948).

---

[22]Statement of Congressman Rankin, sponsor of the bill and chairman of House Committee on World War Veterans' Affairs, in reporting the bill on the floor. 92 Cong. Rec. 6169 (1946).

---

[23]Mr. Rankin told the House that "Several years ago there was a bright scheme concocted to bypass the Veterans' Committee, and at the other end of the Capital an insurance bill was placed as a rider on a tax bill, * * * the Committee * * * could not touch it. As a result they emasculated the insurance law so badly that it became necessary for us to bring out this bill to correct injustice," 92 Cong. Rec. 6169 (1946). The legislative history of the 1940 Act is very sketchy. See H. R. Rep. No. 2894, S. Rep. No. 2114, H. R. Rep. No. 3002, 76th Cong. 3rd Sess. (1940). The testimony of Mr. Harold Breining, Assistant Administrator for Insurance, Veterans' Administration, Hearings before the Subcommittee on Insurance of the Committee on World War Veterans' Legislation, House of Representatives, 79th Cong. 2d Sess. on H. R. 5772 and H. R. 5773 (p. 73) sets out the reasons for the 1940 restrictions.

---

[24]Testimony of Mr. Breining, Hearings, supra, Note 23 (pp. 73, 74, 78); Testimony of General Omar Bradley. Veterans' Administrator, Hearings, supra, Note 23 (p. 6).

---

[25]Testimony of General Bradley, Hearings, supra, Note 23 (p. 6). Rep. Cunningham, member of the Committee on World War Veterans' legislation,

stated on the floor of the House that the bill "will give to the veterans the same kind of insurance, approximately, that he would buy in a commercial policy from any old line company." 96 Cong. Rec. 6171 (1946). See exchange between Congressman Allen and Mr. Breining, Hearings, supra, Note 25 (p. 73).

---

[26]Compare Consolidated Flower Shipments, Inc., v. C.A.B., 205 F. 2d 449 (9th Cir., 1953) with American Fire & Casualty Co. v. Finn, 341 U. S. 6, 10 (1951); Markham v. Cabell, 326 U. S. 404, 409 (1945); U. S. v. Dickenson, 310 U. S. 554, 562 (1940). See Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 Wash. U.L.Q. 2, 17-18 (1939).

---

[27]60 Stat. 785, 786 (1946); 38 U.S.C. 802(t).

---

[28]Washburn v. U. S., 63 F. Supp. 224 (W. D. Mo., 1945).

---

[29]The Executive Assistant Administrator for Veterans' Affairs, G. W. Clark, sent the proposed amendment as it was passed to Senator Vandenburg, President pro tem of the Senate, recommending passage. In this letter he set out the V. A. regulations construing the unamended act [but not the regulation critical in this case] stating that he believed the regulation correctly interpreted the law but asked for the amendment to clarify the situation. Those regulations read the word "beneficiary" in Section 602(u) as "including a contingent beneficiary" so that the estate of the insured would take

> (1) "if the designated beneficiary (including a contingent beneficiary) does not survive the insured;
>
> (2) "if the designated beneficiary (including a contingent beneficiary) not entitled to a lump-sum settlement survives the insured and dies before payment has commenced;

(3) "if the designated beneficiary (including a contingent beneficiary) not entitled to a lump-sum settlement survives the insured and dies after payment has commenced but before receiving all the benefits due and payable."

The estate would take under the regulation only when no beneficiaries were alive to receive payment.

This letter was reprinted in Sen. Rep. 50, 81st Cong., 1st Sess. (1949), and H. R. Rep. 273, 81st Cong. 1st Sess. (1949).

---

[30]The 1949 Amendment inserting the words, "whether accrued or not," recognizes that the payments accrue before actual payment. The Veterans' Administration Regulations recognize that they accrue. 38 C. F. Reg. Sec. 8.88.

---

[31]Letter, Director, Dependents and Beneficiaries Claim Service, Nov. 29, 1951.

---

[32]The bill as passed by the House, H. R. 6371, 79th Cong., 2d Sess. (1946), was introduced by Mr. Rankin after extensive hearings. The Veterans' Administration sponsored a bill (H. R. 4965) which provided in Section 5: "* * * As to hereafter matured insurance, if no person is designated as beneficiary by the insured, the insurance shall be paid in one sum to the estate of the insured; and if the last surviving beneficiary dies prior to receiving all the insurance payable, the commuted value of any unpaid installment certain remaining unpaid shall be paid in one lump-sum to the estate of such beneficiary. * * *" (Emphasis added.)

In the V. A. summary of the bill this Section was headed, "Disposition of insurance not payable or paid to a designated beneficiary," Hearings, supra, Note 23 (p. 8). This section clearly only provided for the disposition of the insurance after there was no beneficiary alive to receive them.

The American Legion, the Veterans of Foreign Wars and the Disabled American Veterans rewrote their previously introduced bills with the V. A. bill in mind. That rewritten bill (H. R. 5772) contained Section 602(u) as it was enacted in Mr. Rankin's bill (H. R. 6371). The V.F.W. representative testified before the Committee that this Section was only "a rewrite" of Section 5 of the V. A. bill. Hearings, supra, Note 23 (p. 123). However, one substantive change was made. Under the V. A. bill "if the last surviving beneficiary dies prior to receiving all the insurance payable" the unpaid balance was payable to the estate of the beneficiary. Under H. R. 5772 and H. R. 6371 if the beneficiary was "entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable" the remainder was payable to the estate of the beneficiary. If, however, "a designated beneficiary not entitled to choose a lump-sum settlement survives the insured and dies before receiving all the benefits due and payable" the remaining insurance goes to the estate of the insured.

This change, which sent the remaining unpaid insurance to the estate of the insured rather than to the estate of the beneficiary where the beneficiary was not entitled to a lump-sum settlement, related only to the unpaid balance. The written summary accompanying H. R. 5772 stated that this section "Provides for payment of unpaid balance of insurance proceeds to estate of the insured generally. Payment to a beneficiary's estate will only be made if a beneficiary dies when receiving installment payments elected in lieu of a lump-sum settlement." Hearings, supra, Note 23 (p. 164). Mrs. Rogers, ranking minority member of the Committee echoed these words in the House debates, 92 Cong. Rec. 6171 (1946). The section was meant to cover the disposition of the unpaid balance in contrast to their disposition under the 1940 Act where the unpaid balance reverted to the Treasury. Representa-

tive Rankin, in reporting the bill said: "* * * that the remainder of any insurance not paid to the beneficiary shall be paid to the estate of the insured, except that if the beneficiary could have claimed a lump-sum payment but chose to be paid in installments the amount remaining after the beneficiary's death will be paid to the estate of the beneficiary. Under existing law if there is no person within the permitted class of beneficiaries above specified living to receive payment of insurance no payments are made." 92 Cong. Rec. 6170 (1946).

---

[33]U. S. v. Henning, 344 U. S. 66 (1952). Mr. Rankin so informed the House. 92 Cong. Rec. 6170 (1946).

---

[34]See Note 23, supra.

---

[35]The amendments to Section 602 (i), (j) and (k) making them inapplicable to insurance maturing after August 1, 1946, were contained in Section 602(u) when the Act passed the House. 96 Cong. Rec. 6168, 6174 (1946). The Senate Committee made them two separate sections. Id. at 9209, 9210, 9211. The House acceded without conference. Id. at 9568, 9569. Mr. Rankin stated that the Senate made only five changes not material here, Id. at 9668.

---

[36]Section 602(u) relates only to insurance payable in installments, except where the beneficiaries do not survive the insured. The two contingencies under which the estate of the insured take involve a beneficiary not entitled to receive a lump-sum. The contingency upon which the estate of the beneficiary takes requires the right to receive a lump-sum but an election "of some other mode of settlement." These "other modes" are all installment payments. 38 U.S.C. 802(t).

---

[37]See note 32, supra, particularly Mr. Rankin's statement at 92 Cong. Rec. 6170 (1946).

---

[38]38 Code Fed. Reg., Sec. 8.90.

---

[39]Sen. Rep. 50, H. R. Rep. 513, 81st Cong. 1st Sess. (1949).

---

[40]The statement of Mrs. Rogers in debate referred to in Note 32, supra, if taken out of context would support this view. In context, however, it refers only to that instance where the unpaid balance would go to the estate of the beneficiary rather than the insured's estate. Counsel for defendant do not cite this for their position, and I think advisedly so.

---

[41]Sen. Rep. 1705, 79th Cong., 2d Sess. (1946).

---

[42]See Note 36, supra.

---

[43]These provisions were characterized by the Supreme Court as an "unmistakable legislative purpose, expressed in so clear a congressional command." U. S. v. Henning, 344 U. S. 66, 76 (1952).

---

[44]U. S. v. Henning, 191 F. 2d 588 (1st Cir., 1951); Baumet v. U. S., 177 F. 2d 806 (2nd Cir., 1949).

---

[45]Mr. Justice Jackson and Mr. Justice Frankfurter dissenting in U. S. v. Henning, 344 U. S. 66 at 79 (1952).

---

[46]Henning v. U. S., 93 F. Supp. 380 (D. Mass., 1950).

---

[47]Washburn v. U. S., 63 F. Supp. 224 (W. D. Mo., 1945); Baumet v. U. S., 81 F. Supp. 1012 (S.D.N.Y., 1948); Carpenter v. U. S., 72 F. Supp. 510 (W. D. Pa., 1947).

---

[48]Cassarello v. U. S., 271 F. 486 (M. D. Pa., 1919).

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Plaintiff above named, and to George Clark, Esq., American Trust Company Building, Berkeley 4, California, her attorney; to Defendant James Harvey Short and Frank V. Cornish, Esq., 409 American Trust Company Building, Berkeley 4, California, his attorney; to Defendant Berkshire Industrial Farm of Canaan, New York, and Randell Larson, Esq., Severson, McCallum & Davis, 38 Sansome Street, San Francisco 4, California, its attorney:

You and Each of You will please take notice that on Tuesday, September 28, 1954, at 11:00 a.m., or as soon thereafter as counsel can be heard, defendant United States of America will move the above-entitled Court before the Honorable Edward P. Murphy, United States District Judge, Post Office Building, Seventh and Mission Streets, San Francisco, California, for a new trial.

Said Motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and will be based on this Notice, the Motion, the Memorandum of Points and Authorities attached to the Motion, and upon all the pleadings, records, and files in this action.

Dated: September 24, 1954.

LLOYD H. BURKE,
United States Attorney;

/s/ RICHARD C. NELSON,

By: RICHARD C. NELSON,
Assistant United States Attorney.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendant United States of America moves for a new trial on all of the issues on the grounds:

1. That the trial was unfair to Movant because:

A. The issue of the reviewability of Veterans Administration Regulation 38 C.F.R. 8.91(b) was not raised by the pleadings, was not argued at the trial, and was not briefed by any party to the case.

B. The issue of the validity of Veterans Administration Regulation 38 C.F.R. 8.91(b) was not argued at the trial, or briefed as an issue by any party to the case.

C. That the Stipulation of Facts, adopted in part by the Court as Findings of Fact, was not signed by the Movant.

D. That the said Stipulation was incomplete in that it failed to show to the Court that Veterans

Administration Form 9-336 (executed by the insured on August 25, 1949) contained information indicating disposition of the insurance would be made under Regulations then existing (8.91 C.F.R.).

2. That the judgment directed by the Memorandum Opinion is contrary to law because:

A. The test of the validity of Veterans Administration Regulation 38 C.F.R. 8.91(b) which was applied by the court was incorrect.

B. Under 38 U.S.C. 802(u) a designated beneficiary can acquire no vested interest unless entitled to a lump sum payment.

C. It awards a portion of the insurance to an unnamed beneficiary (the Estate of Mrs. Short) in preference to named beneficiaries contrary to 38 U.S.C. 802(g).

Dated: September 24, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant United States Attorney.

Memorandum of Points and Authorities

1. Specifications of unfairness, A, B, and C appear from the record and need no citation of authority.

D. Attached hereto is a photostatic copy of V.A.

Form 9-336 executed by the insured on August 25, 1949. Footnote 1 refers to contingent beneficiaries and the situations in which they will take the insurance. The statute made no reference to contingent beneficiaries until 1951. The Regulations, (e.g. 8.91 and 8.77) provided for contingent beneficiaries on and prior to August 25, 1949.

It is clear, therefore, that the insured knew of the Regulations and intended to have the proceeds of his insurance handled as provided therein.

2. A. The test as to validity of a regulation promulgated by a government agency pursuant to congressional authority is not whether another construction is possible, but whether the interpretation by the agency is consistent (i.e. not inconsistent) with the basic act.

See Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 92 L. Ed. 10, 15, where the Supreme Court stated in the above regard:

> "* * * Congress could hardly define the multitudinous details appropriate for the business of crop insurance when the Government entered it. Inevitably 'the terms and conditions' upon which valid governmental insurance can be had must be defined by the agency acting for the Government. And so Congress has legislated in this instance, as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for

> carrying out its policy. * * * Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. * * *"
>
> "Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. * * * Indeed, not only do the Wheat Regulations limit the liability of the Government as if they had been enacted by Congress directly, but, they were in fact incorporated by reference in the application, as specifically required by the Regulations."

In the instant case the district court apparently asumed that the regulation could be held invalid if the conclusion reached by the court on the merits was not precluded by the statute, whereas in fact the regulation must be upheld unless the statute requires the conclusion reached by the court;

B. The Administrator is authorized by Section 608 of the Act, (38 U.S.C.A. (808)) "* * * to make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. * * *" But the authority of the Administrator goes further than to merely

authorize implementing regulations, for Section 602(o) of the Act (38 U.S.C.A. 802(o)), provides as follows:

> "The Administrator shall promptly determine and publish the terms and conditions of such insurance. Pending the promulgation of the terms and conditions of the five-year level premium term policy and the printing of such policy, the Administrator may issue a certificate in lieu thereof as evidence that insurance has been granted and the rights and liabilities of the applicant and of the United States shall be those specified by the terms and conditions of the policy when published." (Emphasis added.)

Paragraph 14 of the five-year level premium term plan policy reads as follows:

> "This insurance is subject to and granted under the provisions of the National Service Life Insurance Act of 1940 and amendments or supplements thereto, and regulations promulgated pursuant thereto, and is subject to the provisions of this policy."

Valid regulations, of course, have the force and effect of law, and are binding upon all concerned, including the courts. See Wilbur National Bank of Oneonta v. United States, 294 U.S. 120, 79 L. Ed. 798; Candell v. United States, 189 F.2d 442 (CCA 10); Horton v. United States, 207 F.2d 91; Walker v. United States, 197 F.2d 226 (CCA 5); Jones v. United States, 189 F.2d 601 (CCA 8); Karas v.

United States, 118 F. Supp. 446 (MD Pa.), affirmed June 30, 1954, ... F.2d .... In the Horton case the court states, at page 93:

> "The statute vests in the Administrator of Veterans Affairs, authority to issue regulations giving waiver and discontinuance of waiver of premiums on National Service Life Insurance policies. Unless inconsistent with the law, such regulations have the force and effect of law and are provisions of the insurance contract between the Veterans Administration and the veteran. Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10, 175 A.L.R. 1075; Jones v. United States, 8 Cir., 189 F.2d 601."

In the Karas case the District Court stated, at page 449:

> "The terms of the contract and the rights and liabilities of the parties under it are fixed by the Act, and the authorized administrative regulations promulgated in conformity with the Act. See Lynch v. United States, 292 U.S. 571 at page 577, 54 S. Ct. 840, 78 L. Ed. 1434; White v. United States, 270 U.S. 175 at page 180, 46 S. Ct. 274, 70 L. Ed. 530; Jones v. United States, 8 Cir., 1951, 189 F.2d 601, 602."

> "The regulations adopted in compliance with the Act have the full force and effect of law, Id. Magruder v. United States, D.C., 31 F.2d 332, and form a part of the insurance contract. Ross

v. United States, 5 Cir., 1931, 49 F.2d 541; United States v. Fitch, 10 Cir., 1950, 185 F.2d 471. As to the interpretation thereof, see United States v. Zazove, 334 U.S. 602 at page 610, 68 S. Ct. 1284, 92 L. Ed. 1601.

"The construction placed upon the statute by those charged with administering it is ordinarily presumed to be correct and will not be judicially otherwise construed, except for strong and compelling reasons. Washburn v. United States, D.C., 63 F. Supp. 224; United States v. Citizens Loan & Trust Co., 316 U.S. 209, 214, 62 S. Ct. 1026, 86 L. Ed. 1387."

The validity of Veterans Administration regulations promulgated with respect to special dividends was upheld in the Jones case, cited supra.

B. Aside from the question of the validity of the Veterans Administration regulation, the conclusion reached by the court is contrary to the controlling statute, Section 802(u), which makes it absolutely clear, as last amended by Public Law 69, 81st Congress, on May 23, 1949, three months prior to the time the insured executed change of beneficiary from designating his mother as principal beneficiary, that in cases where a "designated beneficiary" is "not entitled to a lump sum settlement" such beneficiary acquired no vested interest upon the death of the insured, such as would be acquired if the insured had authorized a lump sum settlement with such beneficiary. The congressional purpose to maintain

this distinction could scarcely be made more definite than was done in House Report 513 and Senate Report 50. From such Report, it appears that the Veterans Administration apprised Congress of the argument that would be made to the effect that benefits which accrued and were unpaid during the lifetime of a beneficiary should be paid to the estate of such beneficiary. Such an argument would, no doubt, be based upon the premise that the right to instalments would vest upon accrual. Such letter then pointed to the advisability of making it clear by the insertion of the words "whether accrued or not," that there would be no such vesting. The full significance of the above amendment apparently has been overlooked by the court; otherwise, the arguments with respect to the nonapplicability of subsections 602(i) and (j) to insurance maturing subsequent to August 1, 1946, would not have been carried to such length. The fact that the Veterans Administration advised the Congress of its interpretation of the Act as reflected in Regulation 3489 (38 C.F.R., 1938 Edition, 8.89), which clearly brings a contingent beneficiary within the terms "beneficiary" or "designated beneficiary" as used in 802(u), 38 U.S.C., gives meaning to the regulation covering the situation existing in this case (Section 8.91). In other words, a contingent beneficiary is definitely given the same priority as a principal designated beneficiary had over an estate; and it is made clear under what circumstances the estate of the insured and the estate of a beneficiary may take, where there has been no designation of either of such estates.

C. The conclusion of the court fails to take into consideration the fact that the insured is given the right in Section 802(g), 38 U.SC. to designate "the beneficiary or beneficiaries of the insurance," and that the only part of such subsection affected by the amendment of August 1, 1946, was the restriction upon the permitted class. The right to designate beneficiaries carries with it, necessarily, the right to stipulate the extent of the interest of each as well as to prescribe the order in which they shall be entitled to take. Since an estate may be designated as a beneficiary, the insured was free to designate an estate as a contingent beneficiary instead of naming particular persons, if he had desired to do so; and it is not carrying out the request of the insured that his mother receive the insurance to award it to her estate; rather it is awarding it to persons not contemplated by the insured.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant United States Attorney.

Dated: September 24, 1954.

Affidavit of Service by Mail attached.

CHANGE OR DESIGNATION OF BENEFICIARY

NATIONAL SERVICE LIFE INSURANCE

Please read Instructions below before filling out form. Type or use ink. Use a separate form for each POLICY on which a change or designation of beneficiary is desired.

DO NOT WRITE IN THIS SPACE

1. FIRST NAME—MIDDLE NAME—LAST NAME (*Print or type*): Irving Ritchie SHORT

2. *List all Policy or Certificate Nos.* FN OR N 804 17 41 FV OR V FH OR H

3. RESIDENCE ADDRESS (*Number and street or rural route, city or P. O., zone number, and State*): 116 E 53rd Street, New York 22, New York

4. BRANCH OF SERVICE: Infantry

5. SERVICE SERIAL NO.: 0-2 006 207

All previous designations of principal and contingent beneficiaries under National Service Life Insurance Policy No. 804 17 41 are hereby canceled and it is directed that said insurance be paid from and after my death as follows:

6 BENEFICIARY CHANGE OR DESIGNATION (*Indicate whether Principal or Contingent*)

COMPLETE NAME AND ADDRESS OF EACH BENEFICIARY (*If married woman, her own first and middle names and husband's last name must be given*)	RELATIONSHIP TO INSURED	AMOUNT OF INSURANCE TO BE PAID TO EACH BENEFICIARY (*Preferably fractions*)
Ethel Grace Short (Mrs James V. Short) ~~1386 Euclid Ave, Berkeley 8, Calif.~~	Mother (Principal)	$10,000.00
James Harvey Short, Maj. Inf. ~~% The Adjutant General, U.S.Army~~	Brother (1st Cont.)	$5,000.00
Berkshire Industrial Farm Canaan, New York	(1st Cont.)	$5,000.00
	ENTERED	

WITNESSED BY	SIGNED AT	DATE
Jay J Conley	Slingerlands, N.Y.	August 25, 1949.
ADDRESS OF WITNESS: Guilderland, New York	SIGNATURE OF INSURED (*Do not print*): Irving Ritchie Short	

INSTRUCTIONS

NOTE.—If change in optional settlement is desired, use VA Form 9-1616, "Change or Selection of Optional Settlement."

1. The insured may designate as principal and/or contingent beneficiary or beneficiaries any person or persons, firm, corporation, or other legal entity (including the estate of the insured) individually or as trustee. Any named beneficiary may be designated in item 6 as "Principal Beneficiary" or "Contingent Beneficiary." Any named beneficiary who is not designated as "Contingent Beneficiary" will, in general, be presumed to be a principal beneficiary. A contingent beneficiary, generally speaking, is a person who becomes principal beneficiary if the designated principal beneficiary predeceases the insured, or if the principal beneficiary, not entitled to settlement under Option 1 (lump sum), dies prior to receiving full payment of all guaranteed monthly installments. The insured will have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary or beneficiaries to cancel the beneficiary designation, or to change the beneficiary. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary will be deemed to be effective as of the date of execution: Provided, that any payment made, before proper notice of designation or change of beneficiary has been received in the Veterans Administration, will be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments. A designation of beneficiary, but not a change of beneficiary, may be made by last will and testament duly probated.
2. SIGNATURE.—Signature of insured should be in ink and witnessed by a person other than a designated beneficiary.
3. DISPOSITION OF FORM.—*When completed, this form should be forwarded immediately to the Office of the Veterans Administration having jurisdiction of policyholder's insurance records.*

VA FORM 9-336 Supersedes VA Form 336, Feb. 1945, which m

Endorsed: Filed September 24, 1954.

[Title of District Court and Cause.]

AMENDMENT OF MOTION FOR NEW TRIAL

Pursuant to agreement made in open court, defendant, United States of America, the moving party, hereby amends its Motion for New Trial by striking from same Ground 1 C.

LLOYD H. BURKE,
United States Attorney.

/s/ RICHARD C. NELSON,

By RICHARD C. NELSON,
Assistant U. S. Attorney.

September 28, 1954.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 28, 1954.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 28th day of September, in the year of our Lord one thousand nine hundred and fifty-four.

Present: The Honorable Edward P. Murphy,
District Judge.

In this case Richard C. Nelson, Esq., Assistant United States Attorney, made a motion for a new

trial. Opposing counsel having been heard herein, It Is Ordered that said motion for new trial be, and the same is hereby, denied.

In the United States District Court for the Northern District of California, Southern Division
No. 31596

MARGARET D. SHORT, as Administratrix of the Estate of ETHEL GRACE SHORT, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, JAMES HARVEY SHORT, Individually and as Administrator of the Estate of IRVING RITCHIE SHORT, Deceased, and BERKSHIRE INDUSTRIAL FARM OF CANAAN, NEW YORK,
Defendants.

JUDGMENT

The above-entitled cause having been duly tried and submitted and the Court having filed its Memorandum of Opinion dated August 10th, 1954, wherein it provided that the facts stipulated to by the parties and said Memorandum of Opinion would constitute the Findings of Fact and Conclusions of Law in said cause, it is now Ordered, Adjudged and Decreed, in accordance with said Findings of Fact and Conclusions of Law, as follows:

That the plaintiff, Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, is entitled to and shall, subject to the provisions hereinafter stated, be paid those unpaid installments which accrued after August 30, 1950, the date of the death of the insured, Irving Ritchie Short, deceased, and prior to June 14th, 1951, the date of death of said Ethel Grace Short, on that certain National Service Life Insurance Policy set out in the Complaint herein and which is designated and numbered Certificate No. 8,041,741; and that said Administratrix shall have and recover from the United States of America the amount of such accrued installments, but subject to the condition that ten per cent (10%) of said sum shall be paid directly to Clark & Morton, attorneys for plaintiff, said amount being hereby fixed by the Court as the reasonable value of the legal services rendered the plaintiff by said attorneys in obtaining the recovery for plaintiff hereinbefore specified. That contingent beneficiaries, James Harvey Short and Berkshire Industrial Farm of Canaan, New York, a corporation, are each entitled to one-half (½) of the remaining balance due under said insurance policy; and that each of said contingent beneficiaries shall have and recover from the said United States of America one-half (½) of said remaining balance under said insurance policy.

Dated: Oct. 6th, 1954.

/s/ MICHAEL J. ROCHE,
Judge.

Approval of Form of Judgment

The above and foregoing form of Judgment is approved.

Dated: Sept. 29, 1954.

CLARK & MORTON,
Attorneys for Plaintiff.

Dated: Oct. 5, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney,
Attorneys for Defendants.

Dated: Oct. 4, 1954.

/s/ RANDELL LARSON,
Attorney for Berkshire Industrial Farm of Canaan, N. Y.

Dated: Sept. 29, 1954.

CORNISH & CORNISH,

By /s/ FRANCIS CORNISH,
Attorneys for Defendant,
James Harvey Short.

[Endorsed]: Filed and entered October 6, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiff in the above-entitled action:

Please Take Notice that the defendant United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered October 6, 1954, in favor of the plaintiff.

Dated: November 30, 1954.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Whereas, judgment was entered in the above-entitled matter on October 6, 1954; Notice of Appeal was filed on November 30, 1954, by defendant United States of America; and

Whereas, the United States Attorney, through Richard C. Nelson, Assistant United States Attor-

ney, has informed the Court that final instructions have not been received from the Department of Justice in Washington, D. C., for the perfecting of the Appeal; and the time originally allowed by Rule 73 of the Federal Rules of Civil Procedure for docketing the record on appeal has not yet expired; now, therefore,

It Is Hereby Ordered that defendant United States of America may have to and including 90 days from the date of filing the first notice of appeal within which to file the record on appeal and docket the appeal, pursuant to Rule 73 of the Federal Rules of Civil Procedure.

Dated: January 6th, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

1. The District Court erred in ruling that the estate of the deceased principal beneficiary, not entitled to lump-sum payment, was entitled to receive those insurance benefits which accrued but were not paid before the death of that beneficiary.

2. The District Court erred in failing to hold that each of the contingent beneficiaries was entitled

to one-half of the insurance benefits which accrued prior to the death of the principal beneficiary but not paid to her, as well as to their share of the benefits accruing after the death of the principal beneficiary.

3. The District Court erred in failing to follow Section 8.91(b) of the Rules and Regulations of the Veterans' Administration, 13 Fed. Reg. 7108, 7119, 38 Code Fed. Regs. 8.91(b).

4. The District Court erred in failing to give effect to the decision of the Administrator of Veterans' Affairs and of the Board of Veterans' Appeals of the Veterans' Administration though that decision was supported by substantial evidence on the whole record.

Dated: February 18, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court or true and correct copies of orders entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for appellants:

Complaint.

Answer of United States.

Answer of Berkshire Industrial Farm.

Amendment of answer of Berkshire Industrial Farm.

Answer of James Harvey Short.

Stipulation of facts and for hearing and submission of case pursuant to stipulation.

Memorandum opinion.

Notice of motion for new trial, motion for new trial, memorandum of points and authorities in support of motion together with Exhibit, and amendment to motion for new trial.

Minute order of September 28, 1955, denying motion for new trial.

Judgment.

Notice of appeal by U. S.

Notice of appeal by James Harvey Short.

Cost bond on appeal by James Harvey Short.

Order extending time for filing record on appeal and docketing appeal.

Designation by U. S. of record on appeal.

Statement of points by U. S. to be relied upon on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of February, 1955.

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14668. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, Appellee. James Harvey Short, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased, Appellant, vs. Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14,668

MARGARET D. SHORT, as Administratrix of the Estate of ETHEL GRACE SHORT, Deceased,

Appellee,

vs.

UNITED STATES OF AMERICA,

Appellant.

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The appellant, United States of America, does hereby adopt as its statement of points to be relied upon on appeal, that Statement of Points to Be Relied Upon on Appeal contained in the certified record of the United States District Court for the Northern District of California, Southern Division, which constitutes a part of this appeal record.

The appellant, United States of America, does hereby adopt as its designation of record on appeal that Designation of Record on Appeal contained in the certified record of the United States District Court for the Northern District of California, Southern Division, which constitutes a part of this appeal record.

Dated: February 28, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ RICHARD C. NELSON,
Assistant U. S. Attorney.

[Endorsed]: Filed February 28, 1955.

No. 14668

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARGARET D. SHORT, AS ADMINISTRATRIX OF THE ESTATE OF ETHEL GRACE SHORT, DECEASED, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.

LLOYD H. BURKE,
United States Attorney.

MELVIN RICHTER,
JULIAN H. SINGMAN,
Attorneys, Department of Justice.

FILED

MAY 16 1955

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Jurisdictional statement	(1)
Statement of the case	2
Questions presented	4
Statute and regulation involved	4
Summary of argument	5
Argument:	
I. The Courts Must Follow Insurance Regulations of the Administrator If Those Regulations Are Not Inconsistent With the Act and Are Necessary or Appropriate to Carry Out Its Purposes	8
A. The Court Below Employed An Erroneous Standard In Determining the Validity of Section 8.91(b) of the Veterans Administration's Regulations	8
B. *United States* v. *Zazove,* 334 U.S. 602, Which Sets Forth the Correct Standard For Review of Veterans Administration Regulations Under the 1940 Act, Supports the Government's Position in This Case	11
II. Section 8.91(b) of the Veterans Administration Regulations, Which Was Followed by the Administrator in This Case, Controls Disposition of the Proceeds in Question	12
A. The Statute Is Silent As To Who Is Entitled to the Disputed Proceeds In This Kind of Case and Hence the Regulation Could Not Be Inconsistent With It	13
B. The Regulation Is Necessary or Appropriate To Carry Out the Purposes of the Act	17
1. *Viewed in "its historical settting," the Act clearly supports § 8.91(b) of the Regulations*	17
2. *The delay in making payment to Mrs. Short was regrettable but unavoidable and cannot change the legal effect of the regulation*	23
Conclusion	26

CITATIONS

Cases:

Adams v. *U.S.,* 319 U.S. 312	8
Baumet v. *United States,* 344 U.S. 82	20
Carter v. *Forrestal,* 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832	8
Claffy v. *Forbes,* 280 Fed. 233 (C.A. 9)	10
Cleveland v. *United States,* 201 F. 2d 398 (C.A. 6)	9

Cases—Continued

Page

Commissioner v. *Flowers,* 326 U.S. 465 16
Gratiot v. *United States,* 45 U.S. (4 How.) 80 8
Helvering v. *Winmill,* 305 U.S. 79 16
Henning v. *United States,* 344 U.S. 66 20
Henning v. *United States,* 93 F. Supp. 380 21
Hicks v. *United States,* 65 F. 2d 517 (C.A. 4) 10
Horton v. *United States,* 207 F. 2d 91 (C.A. 5), certiorari denied, 346 U.S. 903 9
Jones v. *United States,* 189 F. 2d 601 (C.A. 8) 9
McCullough v. *Smith,* 293 U.S. 228 19
Missouri v. *Ross,* 299 U.S. 72 16
National Broadcasting Co. v. *United States,* 319 U.S. 190 8
Norwegian Nitrogen Products Co. v. *United States,* 288 U.S. 294 8
Odom v. *Prudential Life Ins. Co.,* 173 Ore. 435, 145 P. 2d 480 14
Reed, Ex Parte, 100 U.S. 13 8
Rosen v. *United States,* 245 U.S. 467 8
Singleton v. *Cheek,* 284 U.S. 493 19
United States v. *American Trucking Ass'ns, Inc.,* 310 U.S. 534 8
United States v. *Citizens Loan & Trust Co.,* 316 U.S. 209 .... 8, 9, 24
United States v. *Henning,* 344 U.S. 66 .... 17, 23, 24, 25
United States v. *Henning,* 191 F. 2d 588 (C.A. 1) 20
United States v. *Leverett,* 197 F. 2d 30 (C.A. 5) 13
United States v. *Madigan,* 300 U.S. 500 .... 8, 9
United States v. *Snyder,* 177 F. 2d 44 (C.A. D.C.) 9, 13
United States v. *Zazove,* 334 U.S. 602 .... 5, 9, 10, 11, 17, 19
Washburn v. *United States,* 63 F. Supp. 224 (W.D. Mo.) 14

Statutes and Regulations:

Act of August 1, 1946, c. 728, 60 Stat. 781:

§ 4 15
§ 9 .... 4, 21

National Service Life Insurance Act of 1940, as amended, 54 Stat. 1009, as amended: 3, 4, 5, 6, 7, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24

Sec. 602(g), 38 U.S.C. 802(g) 14
Sec. 602(h)(3), 38 U.S.C. 802(h)(3) 8, 22
Sec. 602(o), 38 U.S.C. 802(o) 9, 17
Sec. 602(t), 38 U.S.C. 802(t) 21
Sec. 602(u), 38 U.S.C. 802(u) 4, 6, 13, 14, 15, 16, 21, 22
Sec. 608, 38 U.S.C. 808 .... 9, 17
Sec. 617, 38 U.S.C. 817 2

Regulations of the Veterans Administration: Page

Sec. 8.89, 13 F.R. 7108, 38 C.F.R. 8.89 (1949) 14, 16
Sec. 8.91(b), 13 F.R. 7108, 38 C.F.R. 8.91(b) (1949), (1), 4, 5, 7, 8, 14, 16, 17, 18, 19, 22
Sec. 10:3449, 6 F. R. 1162 9
Sec. 10:3489, 11 F.R. 9285 .... 14, 16
Sec. 10:3491, 13 F.R. 2584 8

Servicemen's Indemnity Act of 1951, 65 Stat. 33, 38 U.S.C. 851, *et seq.* 20
World War Veterans' Act of 1924, as amended, 43 Stat. 607, as amended 19, 21, 24
Sec. 19, 38 U.S.C. 445 2
Sec. 26, 38 U.S.C. 451 19
Sec. 303, 38 U.S.C. 514 19

Miscellaneous:

29 Am. Jur. § 1271 14
H. Rept. No. 513, 81st Cong., 1st Sess. 16
S. Rept. No. 50, 81st Cong., 1st Sess. 16
S. Rept. No. 91, 82nd Cong., 1st Sess. 20

In the United States Court of Appeals for the Ninth Circuit

No. 14668

United States of America, appellant

v.

Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased, appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from judgment entered on October 6, 1954 by the District Court for the Northern District of California, Southern Division, granting injunctive and declaratory relief to the plaintiff-appellee. This action was brought in June, 1952 by the appellee, administratix of the estate of a principal beneficiary under a National Service Life Insurance policy, seeking a declaration that she was entitled to certain insurance proceeds that had become payable to appellee's decedent during her lifetime but had not been paid. Placed in issue was the validity of § 8.91(b) of the Regulations

of the Veterans Administration (38 C. F. R. 8.91(b) (1949)) which provides that in the circumstances of this case payment should be made to the contingent beneficiaries rather than to the estate of the principal beneficiary. The jurisdiction of the District Court was founded upon § 617 of the National Service Life Insurance Act of 1940, as amended, 54 Stat. 1014, as amended, 38 U. S. C. 817; and upon § 19 of the World War Veterans' Act of 1924, as amended, 43 Stat. 607, as amended, 38 U. S. C. 445. This Court's jurisdiction rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

Irving Ritchie Short, while in the Army during World War II, was issued a National Service Life Insurance policy in the face amount of $10,000, effective January 1, 1943 (R. 52). The policy remained in effect until Short's death in 1950. On August 25, 1949 the insured changed the beneficiaries of that policy, naming his mother Mrs. Ethel G. Short, appellee's decedent, as principal beneficiary, and his brother James Harvey Short, and the Berkshire Industrial Farm, a charitable institution, as contingent co-beneficiaries (R. 53, 100). However, at no time did the insured select any form of payment to be made to the beneficiaries (R. 53).

Insured died on August 30, 1950 in an Army hospital in Tokyo, Japan after having been honorably discharged from service (R. 52, 54). He had come to Japan from Formosa to undergo physical examinations prior to being recalled into active service as a commissioned officer. Upon being examined he was found to be suffering from acute poliomyelitis and was immediately hospitalized but died a few days after admittance (R. 55).

In September of 1950, shortly after her son's death, Mrs. Short, the principal beneficiary, filed a claim with the Veterans Administration seeking payment of the

policy in question (R. 60). In response to letters from Mrs. Short and her attorneys, the Veterans Administration informed Mrs. Short's attorneys in December of 1950 that certain evidence was needed before processing of the claim could begin (R. 63). Subsequently Mrs. Short's attorneys were notified on several occasions that no action could be taken on any claim for proceeds under Irving R. Short's policy until an official report of death was received from the appropriate Government Department and that some difficulty was being encountered because of uncertainty as to the status of the deceased at the time of his death; *i.e.*, whether or not he had yet reentered the service (R. 64-66).

The official report of death was finally received from the State Department on July 3, 1951, but in the meantime Mrs. Short had died on June 14, 1951 (R. 70). Thereupon, the Veterans Administration informed Mrs. Short's attorneys that according to its regulations it had no choice but to pay the proceeds of the policy, including those installments that had accrued after the insured's death but before the death of Mrs. Short, to the designated contingent co-beneficiaries (R. 70). A ruling to that effect was made by the Director of Dependents and Beneficiaries Claims Service on November 29, 1951 and on May 2, 1952 that ruling was affirmed by the Board of Veterans Appeals (R. 30).

This suit was then brought by Mrs. Short's administratix, the appellee in this case, (R. 3-32), and a stipulated statement of facts was filed (R. 51-71). The District Court issued an opinion in August, 1954 ordering entry of judgment for the principal beneficiary's estate in the amount of the insurance benefits which were accrued but unpaid prior to Mrs. Short's death upon the ground that the Veterans Administration regulation which "specifically covers the case"

(R. 75) was not supported by the Act (R. 71). Judgment was entered on October 6, 1954 (R. 102-103), and the United States and appellant James Harvey Short, administrator of the estate of the insured, then appealed (R. 105).[1]

QUESTIONS PRESENTED

1. Whether a regulation of the Veterans Administration must be given effect by the courts if it is not inconsistent with the National Service Life Insurance Act and is necessary or appropriate to carry out its purposes, notwithstanding that the regulation may be "legislative" in nature.

2. Whether § 8.91(b) of the Veterans Administration Regulations—providing that insurance installments accrued but unpaid to a deceased principal beneficiary not entitled to lump-sum settlement should be paid to the contingent beneficiary—is inconsistent with § 602(u) of the Act.

3. Whether § 8.91(b) of the Veterans Administration Regulations is necessary or appropriate to carry out the purposes of the Act.

STATUTE AND REGULATION INVOLVED

Section 602(u) of the National Service Life Insurance Act of 1940, as added by § 9 of the Act of August 1, 1946, 60 Stat. 781, as amended by the Act of May 23, 1949, 63 Stat. 74, 38 U. S. C. 802(u), provides:

> With respect to insurance maturing on or subsequent to August 1, 1946, in any case in which the beneficiary is entitled to a lump-sum settlement but elects some other mode of settlement and dies before receiving all the benefits due and payable un-

---

[1] The administrator of the insured's estate contended that he was entitled to the entire $10,000, but the court found against him, see pp. 13-17, *infra*.

der such mode of settlement, the present value of the remaining unpaid amount shall be payable to the estate of the beneficiary; and in any case in which no beneficiary is designated by the insured or the designated beneficiary does not survive the insured, or a designated beneficiary not entitled to a lump-sum settlement survives the insured, and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured: *Provided,* That in no event shall there be any payment to the estate of the insured or of the beneficiary of any sums unless it is shown that any sums paid will not escheat.

2. Section 8.91(b) of the Regulations of the Veterans Administration, 13 F. R. 7108, 38 C. F. R. 8.91(b) (1949) provides:

> If the principal beneficiary of National Service life insurance maturing on or after August 1, 1946, does not survive the insured or if the principal beneficiary not entitled to a lump-sum settlement survives the insured but dies before payment has commenced, the insurance shall be paid to the contingent beneficiary in accordance with the provisions of § 8.77.

SUMMARY OF ARGUMENT

I

Although the court below recognized that the Veterans Administration regulation requiring payment of the disputed proceeds to the designated contingent beneficiary "specifically covers the case," it refused to follow that regulation. It did so because it held the regula-

tion to be unsupported by the Act, "legislative" rather than "interpretive," and therefore invalid. This is an erroneous standard for judicial review of Veterans Administration regulations. The Supreme Court clearly ruled in *United States* v. *Zazove,* 334 U. S. 602, that a Veterans Administration insurance regulation must be upheld and given effect by the courts if it is not inconsistent with the National Service Life Insurance Act of 1940 and is necessary or appropriate to carry out the purposes of that Act.

II

The regulation in question could not be inconsistent with the Act because the only section of the Act relating to payment of proceeds after the death of a designated beneficiary was not intended to cover this particular fact situation. The legislative history of the Act and its general purposes reinforce the view that Section 602(u), which requires that accrued unpaid proceeds be paid to the estate of the insured when a "designated beneficiary" dies before receiving any payment, was intended to apply only when no beneficiary, contingent or principal, is still living. This was the view adopted by the court below and we agree with that view.

The regulation adopted by the Veterans Administrator carries out the broad purposes of the National Service Life Insurance Act of 1940 and the putative intent of the average policyholder by preferring living beneficiaries to the estates of decedents. This favors the natural objects of a policyholder's bounty rather than a deceased beneficiary's creditors or heirs in whom the policyholder might have little or no interest. It is therefore clearly necessary and appropriate to carry out the purposes of the Act.

Although the delay in processing Mrs. Short's claim is regrettable, it was unavoidable, being caused by confusion as to the status of Irving Short engendered by his death in an Army hospital while being examined prior to recall from the Reserves into active service but before his actual entry into that service. The Supreme Court has said on several occasions that such delay cannot affect construction of regulations or statutes.

ARGUMENT

The court below ruled that the estate of a principal beneficiary of National Service Life Insurance, not entitled to a lump-sum settlement,[1a] was entitled to receive those installments of insurance proceeds that had accrued but had not been paid before her death. This ruling was made in the face of a clear regulation of the Veterans Administration (§ 8.91(b), 38 C.F.R. 8.91 (b) (1949) providing that these accrued but unpaid proceeds be paid to the contingent beneficiary. The court admitted that "the regulation specifically covers the case" (R. 75), but refused to follow it on the ground that the regulation was not supported by the statute. We shall show first that the district court employed an erroneous standard in declining to follow the regulation and, second, that the regulation is supported by the statute and is therefore fully valid and dispositive of this case.

[1a] As will be explained *infra*, p. 21, the 1940 Act permitted payment of National Service Life Insurance proceeds on the installment plan only; however in 1946 the Act was amended to permit lump-sum settlements in certain circumstances.

I

The Courts Must Follow Insurance Regulations of the Administrator If Those Regulations Are Not Inconsistent with the Act and Are Necessary or Appropriate to Carry Out Its Purposes.

A. *The Court Below Employed An Erroneous Standard In Determining the Validity of Section 8.91 (b) of the Veterans Administration's Regulations.*

There is no question that an administrative regulation promulgated within the authority granted by statute has the force of law and will be given full effect by the courts. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Rosen* v. *United States,* 245 U.S. 467; *Ex Parte Reed,* 100 U.S. 13; *Gratiot* v. *United States,* 45 U. S. (4 How.) 80; *Carter* v. *Forrestal,* 175 F. 2d 364 (C.A.D.C.), certiorari denied, 338 U.S. 832.

It is also a familiar principle that a consistent administrative construction "is entitled to great weight, 'and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.' *United States* v. *Jackson,* 280 U.S. 183, 193." *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209, 214; *United States* v. *Madigan,* 300 U.S. 500, 505. This general rule, of course, "has peculiar weight when it involves a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *Adams* v. *United States,* 319 U.S. 312, 314-315; *United States* v. *American Trucking Assns., Inc.,* 310 U.S. 534, 549.

The forerunner of Section 8.91(b) of the Regulations of the Veterans Administration was Section 10:3491, 13 F.R. 2584, which was promulgated in May 1948. That regulation, as this one, construed the statute as requiring that accrued but unpaid proceeds, such as those here in question, be paid to the contingent beneficiary. Thus, for 7 years this same construction of the 1946 amendments has been consistently followed by the "men charged with the responsibility of setting [the Act's] machinery in motion." And even before the 1946 amendments, Section 602(h)(3) of the 1940 Act, (54 Stat. 1009, 1010, 38 U.S.C. 802(h)(3)) which provided for the disposition of installments unpaid to deceased beneficiaries was interpreted as applying to those unpaid installments that had accrued as well as to the installments not yet accrued. See *e.g.,* § 10:3449, 6 F.R. 1162.

Despite the judicial tradition of deferring to longstanding administrative construction, the District Court refused to accept the regulation, apparently being of the view that the regulation would be binding upon the court only if it was "interpretive" of the statute, but that if it was "legislative" in nature, it must fall (R. 75). Whatever be the correctness of that standard as applied to other administrative regulations, it clearly does not apply to the regulations of the Veterans Administrator. This is so at least partly because of the broad statutory grant of power to the Administrator to "determine and publish the terms and conditions of [National Service Life Insurance]," Sec. 602(o), 54 Stat. 1009, 1011, 38 U.S.C. 802(o), and to "make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes." Sec. 608, 54 Stat.

1009, 1012, 38 U.S.C. 808. *United States* v. *Zazove,* 334 U.S. 602, 611. Moreover, the practice is well-established in the federal courts of deferring to the judgment of the Veterans Administrator in matters dealing with the administration of veterans' insurance. *United States* v. *Citizens Loan & Trust Co.,* 316 U.S. 209; *United States* v. *Madigan,* 300 U.S. 500; *Horton* v. *United States,* 207 F. 2d 91 (C.A. 5), certiorari denied, 346 U.S. 903; *Cleveland* v. *United States,* 201 F. 2d 398 (C.A. 6); *Jones* v. *United States,* 189 F. 2d 601 (C.A. 8); *United States* v. *Snyder,* 177 F. 2d 44 (C.A.D.C); *Hicks* v. *United States,* 65 F. 2d 517 (C.A. 4); *Claffy* v. *Forbes,* 280 Fed. 233 (C.A. 9).

The chief cause for the error of the District Court lies in its analysis of this case as if it were one involving commercial insurance. The court began with the assumption that a beneficiary's right to receive insurance proceeds vests upon the death of the insured, which is the usual commercial rule, and then it searched for reasons why this rule should not apply here (R. 78-81). Finding none it granted judgment for the estate of the principal beneficiary. But National Service Life Insurance is not commercial insurance. No matter how the 1946 amendments broadened the Act (and we will examine *infra* how these amendments liberalized the Act) it is still statutorily created Government insurance and must be so considered when judicially reviewed. This principle was succinctly stated by the Supreme Court in *United States* v. *Zazove,* 334 U.S. at 610:

> There is, of course, a marked distinction between the criteria for judicial construction of an ordinary commercial insurance contract, and construction of the provisions of an act of Congress set-

ting up a system of national life insurance for servicemen to be administered by a governmental agency. The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind. In this respect, judicial construction of the statute may appear similar to construction of a commercial policy, where ambiguous provisions are generally construed in favor of the insured.* * * But the statute is an expression of legislative intent rather than the embodiment of an agreement between Congress and the insured person. Only the intent of Congress, which, in this case is the insurer, need be ascertained to fix the meaning of the statutory terms; the layman understanding of the policy holder does not have the relevance here that it has in the construction of a commercial contract.

B. *United States* v. *Zazove, 334 U. S. 602, Which Sets Forth the Correct Standard for Review of Veterans Administration Regulations Under the 1940 Act, Supports the Government's Position in This Case.*

The Supreme Court carefully explained in *United States* v. *Zazove,* that, in reviewing insurance regulations of the Administrator, courts must examine the pertinent section of the Act in relation to the Act's other sections and in relation to its legislative history for the purpose of determining "whether the regulation is 'not inconsistent' with the provisions of the Act and whether it is 'necessary or appropriate to carry out its purposes.' " 334 U.S. at 612. The court went on in that case to uphold the regulations of the Veterans Administration governing the payment of annuities. As the court below stated (R. 75), "The Veterans' Ad-

ministration regulations involved in Zazove were reviewed as if the regulations were interpretive. They more closely approached legislative regulations than the regulation involved in this case." In view of this observation, it is difficult to understand how the court could have made the decision it did consistent with the *Zazove* case.

However, the trial court quoted language from *Zazove* that Veterans Administration regulations are "not automatically to be deemed valid merely because not plainly interdicted by the terms of the particular provisions construed." The court apparently read this language as leaving it within its discretion whether or not to follow the regulation, and if this had been so, then the opinion that was written would not have been an unreasonable one.

But as the Supreme Court has emphasized, where a regulation covers a case before the courts, the decision to be made is not the same as if the case were an original question. The regulation must be given effect unless it is inconsistent with the Act or not necessary or appropriate to carry out its purposes. In this case the question of disposing of these approved but unpaid proceeds had already been raised and answered by the Administrator in his capacity as rulemaker for National Service Life Insurance. It was in failing to give due consideration to that regulation, in failing to examine it according to the standards laid down by the Supreme Court, that the district court erred.

II

Section 8.91(b) of the Veterans Administration Regulations, Which Was Followed by the Administrator in This Case, Controls Disposition of the Proceeds in Question.

Focusing attention on the particular facts of this case and upon the legal principles necessary to resolve this dispute, it is well to remember that the issue at bar is a simple one. The representative of the insured, the representative of the principal beneficiary (the insured's mother), who was not entitled to a lump-sum settlement under the Act, and the contingent co-beneficiaries (the insured's brother and a charitable institution catering to unfortunate boys), so designated by the insured, each claim the right to receive that part of the proceeds of the insured's policy (about $2,600) [2] which became payable to the principal beneficiary during her lifetime but which was not paid to her before her death.

The court below decided in favor of the estate of the principal beneficiary. The United States, a defendant in this action and interested in supporting its lawfully promulgated regulations and in carrying out the will of Congress (see *United States* v. *Leverett,* 197 F. 2d 30 (C. A. 5), and *United States* v. *Snyder,* 177 F. 2d 44 (C. A. D. C.)), has appealed because it believes that a lawful regulation of the Veterans Administration—providing that in this kind of case the disputed proceeds should be paid to the contingent beneficiary—should be controlling. We have argued before that if the regulation in question can be shown to be not inconsistent with the Act and also necessary or appropriate to carry out

---

[2] Mrs. Short chose to receive 36 equal monthly installments (R. 52). If that option had been approved she would have received $289.90 monthly or a total of about $2,609.10 between her son's death and her own.

its purposes, then the courts must follow that regulation, giving it full effect as if it were part of the statute. In this part of the brief it will be shown that this regulation meets those requirements.

A. *The Statute Is Silent As To Who Is Entitled to the Disputed Proceeds In This Kind of Case and Hence the Regulation Could Not Be Inconsistent With It.*

Section 602(u) of the National Service Life Insurance Act of 1940, as amended, provides that where "a designated beneficiary not entitled to a lump-sum settlement * * * dies before receiving all the benefits due and payable * * * the remaining unpaid insurance (whether accrued or not) shall be paid in one sum to the estate of the insured." If that section had been applicable to this case, then Regulation § 8.91(b) which provides that in these circumstances payment should go to the contingent beneficiary would have been inconsistent with the Act and therefore invalid, and appellant James Harvey Short, executor of the estate of the insured, would have been entitled to the proceeds in question. But the district court found that section inapplicable, and we agree with that conclusion.

The court below concluded that the phrase "designated beneficiary" in Section 602(u) includes contingent as well as principal beneficiaries and that therefore the section applies only where no designated beneficiary, contingent or principal, is still living (R. 77). This is the construction that has been followed by the Veterans Administration since the statute was first enacted, § 10:3489, 11 F. R. 9285, 38 C. F. R. 10:3489 (Supp. 1946), 38 C. F. R. 8.89 (1949), and is the construction inferentially approved in *Washburn* v. *United States,* 63 F. Supp. 224 (W. D. Mo.) where it was held

that the phrase "beneficiary" in Section 602(g) of the Act, 54 Stat. 1009, 1010, 38 U. S. C. 802(g), includes contingent as well as principal beneficiaries.[3] This construction is also in keeping with the countless rulings in the field of commercial insurance defining "beneficiary" as anyone entitled to receive proceeds under an insurance policy. See, *e. g., Odom* v. *Prudential Life Insurance Co.,* 173 Ore. 435, 145 P. 2d 480; 29 Am. Jur. § 1271.

If the construction given Section 602(u) by the Veterans Administration and by the court below were overturned and that section were held applicable whenever a designated *principal* beneficiary not entitled to lump-sum settlement survived the insured but died before receiving all payments, even though other designated beneficiaries were still alive, then persons designated by the insured, and therefore presumably objects of his bounty, would be cut off from any of the policy proceeds in favor of the insured's estate. In many cases this would mean that creditors of the insured's estate, expenses of administration, and taxes could take the bulk, if not all, of the insurance money. If a holder of a National Service Life Insurance policy should want such a result, he could designate his own estate as a beneficiary. This has been possible since 1946, § 4, Act of August 1, 1946, c. 728, 60 Stat. 781. Here, however, when the insured last changed the beneficiaries of his policy in August of 1949 (R. 100), he specifically designated his brother and the Berkshire Industrial Farm as contingent beneficiaries, *not* his own estate, thereby making his intention clear that if the principal beneficiary did not survive to receive all the proceeds, then he wished the

---

[3] Sec. 602(g) gives to policyholders the right to designate beneficiaries of the insurance. The *Washburn* case decided that this permitted them to designate contingent beneficiaries as well as principal beneficiaries.

remainder to be divided among these contingent beneficiaries. It is therefore, reasonable to assume, as the Veterans Administration and the court below did, that the insured intended that there be a complete failure of beneficiaries before any part of the insurance proceeds should revert to his estate.

If any further support is needed to prove that Section 602(u) does not require payment of the insurance proceeds to the estate of the insured, then it should be noted that since 1948 Congress has known of the construction given to Section 602(u) by the Veterans Administration and has seen fit not to interfere, though it has amended the Act in other particulars since that time. In September 1948 identical letters addressed to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate were sent to the Congress informing them of this Veterans Administration construction and quoting the text of Regulation Section 10:3489 (now 38 C. F. R. 8.89 (1949)).[4] These letters were printed in both committee reports of a suggested amendment (subsequently enacted) to the Act. S. Rept. No. 50, H. Rept. No. 513, 81st Cong., 1st Sess. In these circumstances, Congress's failure to change the regulation legislatively can only be taken as tacit approval. Cf. *Commissioner* v. *Flowers,* 326 U. S. 465,

---

[4] That section, in pertinent part, provided as follows:

> If no person is designated beneficiary by the insured, or if the designated beneficiary (*including a contingent beneficiary*) does not survive the insured, or if the designated beneficiary (*including a contingent beneficiary*) not entitled to a lump-sum settlement survives the insured and dies before payment has commenced, the face amount of insurance less any indebtedness shall be paid to the insured's estate in one sum, provided that in no event shall there be any payment to such estate of any sums which, if paid, would escheat. [Italics supplied].

469; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Missouri* v. *Ross,* 299 U. S. 72, 75.[4a]

Of course, if, as we contend, Section 602(u) of the Act controls only the case where no living designated beneficiary exists then Regulation Section 8.91(b)—which provides for the payment of installments accrued but not paid when the principal beneficiary has died but contingent beneficiaries are still alive—could not possibly be said to be inconsistent with that section. The two provisions are complementary rather than conflicting. Moreover, no other section of the Act relates explicitly or impliedly to the question of how to dispose of insurance proceeds in this fact situation nor have we found anything in the legislative history of the act or its many amendments that deals with this problem—in short, nothing in the Act can be said to be inconsistent with Veterans Administration Regulation Section 8.91(b).

B. *The Regulation Is Necessary or Appropriate to Carry Out the Purposes of the Act*

There being no statutory direction for disposing of insurance proceeds in a case of this kind, payment must be controlled by regulations of the Veterans Administrator promulgated under his broad statutory powers to "determine and publish the terms and conditions of such insurance," § 602(o) of the Act, 54 Stat. 1009, 1011, 38 U. S. C. 802(o), and to "make such rules and regulations, not inconsistent with the provisions of this Act, as are necessary or appropriate to carry out its purposes." § 608, 54 Stat. 1009, 1012, as amended, 38

[4a] For further legislative support see n. 32 in the opinion of the court below (R. 86-8).

U. S. C. 808. We have just showed that Section 8.91(b) of the Regulations is not inconsistent with the Act. *Supra*, pp. 13-17. To establish its validity then, it need only be shown that this regulation "is necessary or appropriate to carry out [the Act's] purposes." *United States* v. *Zazove*, 334 U. S. 602, 611-612. See pp. 11-12, *supra*.

1. *Viewed in "its historical setting,"* [5] *the Act clearly supports § 8.91(b) of the Regulations.* In formulating a regulation to provide for the disposition of accrued but unpaid funds such as these, the Administrator could have chosen any one of 3 possible solutions: (a) the rule that applies when no beneficiaries, contingent or principal, are still living could have been extended to cover this case so that the proceeds would be paid to the estate of the insured; (b) the rule that applies when the principal beneficiary *is* entitled to a lump-sum settlement could have been extended to this case to make the estate of the principal beneficiary entitled to receive the disputed proceeds; or, finally, (c) a new rule could have been established to provide for these special facts and making the award to the contingent beneficiaries who were designated by the insured. The Administrator chose the last of these possibilities, a rule that is not only appropriate to carry out the purposes of the Act, but is probably the most reasonable and appropriate of the three.[6]

The rule promulgated by the Veterans Administrator (Sec. 8.91(b)) is the most suitable because it is tailor-made to the particular fact situation and not dependent upon rules designed for other facts. It is best calcu-

---

[5] *United States* v. *Henning*, 344 U.S. 66, 72.

[6] It hardly requires proof that any of the three possibilities would be "necessary" to carry out the purposes of the Act. If for no other reason, it would avoid uneven or discriminatory treatment.

lated to carry out the broad purposes of the Act and the general intent of policyholders. Each of the other two alternatives results in benefiting a decedent estate rather than a living beneficiary, a result believed to be contrary to the intent of the average policyholder. National Service Life Insurance policyholders are told in general terms what a beneficiary is when they make a designation (R. 100), and in what circumstances the beneficiaries will take. It has therefore been the standard practice of the Veterans Administration to carry out to the best of its ability any such designation, and it has been assumed that the insured, if he could be asked, would prefer a designated contingent beneficiary to the creditors or heirs of the deceased principal beneficiary in whom the insured might have little or no interest.[7] This assumption is the foundation of Section 8.91(b).

The history of the 1940 Act leaves little doubt that Congress has made the same assumption. From the beginning, the underlying policy of National Service Life Insurance has been to benefit living people, to care for the families and friends of men who were called away to war never to return. In enacting the National Service Life Insurance Act of 1940, the draftsmen had the benefit of experience under the World War Veterans' Act of 1924, 43 Stat. 607, which provided for payment to a beneficiary's personal representative of ac-

[7] To take a common example, suppose that an insured is married and has no children, he names his wife as the principal beneficiary and his parents or brothers and sisters as contingent beneficiaries. If his wife then dies before receiving any payments, the accrued unpaid installments would, under the construction below, go to her estate and thus to her creditors and heirs, which would be the members of her family. On the other hand, under our construction, the accrued unpaid installments would go to the insured's family as the designated contingent beneficiaries. The latter result is far more in accord with the normal intent of an insured than the result under the construction below.

crued installments of insurance unpaid at the time of his death (Section 26, 28 U. S. C. 451), and to the estate of the insured of the present value of all unmatured installments (Section 303, 38 U. S. C. 514). In view of these express provisions in the 1924 Act for payment to the beneficiary's estate of installments accrued but unpaid, (*McCullough* v. *Smith,* 293 U. S. 228, *Singleton* v. *Cheek,* 284 U. S. 493), which Act was used as a model in drafting the benefit provisions of the 1940 Act (*United States* v. *Zazove,* 334 U. S. 602, 617-19), the omission of similar provisions from the Act of 1940 emphasizes Congress's intention to limit insurance benefits to living beneficiaries.

This same policy can be seen in the Servicemen's Indemnity Act of 1951, 65 Stat. 33, 38 U. S. C. 851, *et seq.* That statute, which awarded free life insurance in the amount of $10,000 to servicemen during the period of military service, again expressly established the principle of permitting payments only to authorized beneficiaries alive to receive them in the following provision (Sec. 3, 38 U. S. C. 852):

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise, to the beneficiary or beneficiaries within the permitted class next entitled to priority: *Provided,* That no payment shall be made to the estate of any deceased person.

See also S. Rept. No. 91, 82nd Cong., 1st Sess. 8. Reaffirmation of this principle in circumstances comparable to those which surround the National Service Life Insurance Act convincingly evidences deliberate Congressional policy to prefer living people as beneficiaries

of Government insurance rather than estates of deceased people.

This policy of preferring the living is so strong that it prompted the Supreme Court to hold in *Henning* v. *United States,* 344 U. S. 66, and *Baumet* v. *United States,* 344 U. S. 82, that the Act required forfeiture to the National Service Life Insurance Fund if no beneficiary was alive, although some lower courts had held otherwise. *United States* v. *Henning,* 191 F. 2d 588 (C.A. 1); *Henning* v. *United States,* 93 F. Supp. 380 (D. Mass.).

The court below concluded, however, that this policy was changed in 1946. It reasoned that since many of the narrow limitations upon National Service Life Insurance contained in the Act of 1940 were removed by the 1946 amendments, the purpose of those amendments was to liberalize the insurance and make it more like commercial life insurance. While this is true in general, a more detailed analysis of the amendments reveals that the Act was broadened in certain particulars but not in others. The broad provisions for payment to personal representatives of beneficiaries that appeared in the 1924 Act, 43 Stat. 614, 38 U. S. C. 451, were not reenacted. Instead, special rules were established only for lump-sum settlements. Until 1946, beneficiaries could be paid only on the installment plan. In § 602(t), § 9, 60 Stat. 781, 38 U. S. C. 802(t), added by the 1946 amendments, policyholders were permitted for the first time to designate a commercial-type lump-sum settlement as one form of payment to the beneficiary. However, beneficiaries are not entitled to this lump-sum settlement unless the insured himself so specifies. And if the insured does choose to permit a lump-sum settlement, nevertheless a beneficiary can select payment on

the old-style installment plan basis. Thus the total effect of § 602(t) was to add to the Act a new form of payment while retaining the old installment plans as well.

Section 602(u) was added to provide for disposal of payments that have accrued to a beneficiary entitled to the new type lump-sum settlement but who had not been paid before death. Congress provided that such payments were to be made according to the commercial rule, *i.e.,* that the right to receive the entire lump sum would vest in the beneficiary immediately upon the death of the insured, whether or not the beneficiary had chosen to receive the lump sum, provided only that the beneficiary survive the insured. But Congress carefully distinguished in Section 602(u) between this new rule, which would be applicable only to beneficiaries entitled to receive the new commercial-type lump-sum payment, and the old rule which would continue to apply to those beneficiaries entitled only to the old-style installment payments. The second half of this subsection made plain that beneficiaries not entitled to the lump-sum settlement would not have a vested right to any of the proceeds but that "the remaining *unpaid* insurance *(whether accrued or not)* shall be paid in one sum to the estate of the insured." [Italics supplied.]

We have explained *supra,* pp. 13-17, that this part of Section 602(u) was intended to apply only where no designated beneficiary, contingent or principal, is still living, but it illustrates that the long-standing rule against the vesting of rights to unpaid installments "whether accrued or not" is to remain, except with respect to beneficiaries entitled to the new lump-sum

settlement.[8] Thus the second half of Section 602(u) had a dual purpose. First it was designed to retain the pre-1946 policy of permitting no vesting of rights to insurance benefits where the beneficiary was entitled only to installment payments, and second its purpose was to change the pre-1946 rule requiring forfeiture to the Fund of any payments which could not be made to living persons by awarding otherwise forfeitable payments to the estate of the insured. Section 8.91(b) of the regulations furthered the first purpose of continuing the rule against vesting, requiring payment to the contingent beneficiary next in line rather than to any estate. And it may be observed that in this case there is no question of forfeiture—all the insurance proceeds will eventually be paid out—rather the issue here is the choice among beneficiaries, the living contingent beneficiaries on the one hand, and the estate of the principal beneficiary on the other.

2. *The delay in making payment to Mrs. Short was regrettable but unavoidable and cannot change the legal effect of the regulation.* The distinguished district judge stated in his opinion:

> I cannot believe that Congress intended that the rights of the principal beneficiary could be defeated by an administrative failure to pay or by litigation over the proceeds extending beyond that beneficiary's death.

---

[8] This same policy against vesting (which is merely an extension of the policy favoring living persons) was followed under Section 602(h)(3) of the 1940 Act. See pp. 8-9, *supra*.

Almost the identical reasoning was rejected by the Supreme Court in *United States* v. *Henning,* 344 U.S. 66 at 74. In that case the Court said (at pp. 75-76):

> We are not unmindful of the fact that unanticipated delay in the payment of policy proceeds may withhold from a beneficiary the funds that Congress intended him to get; seven years and three deaths have not yet brought this litigation to an end. But we cannot apportion the blame for this cruel delay. And we may surely not speculate that the officials entrusted with the administration of the Act would attempt to enrich other beneficiaries or the treasury itself by a sardonic waiting game.
>
> We conclude that in this crisis legislation Congress, fully aware of the sometimes inevitable delays in payment, preferred the occasionally harsh result to a course of action which would permit funds intended for living members of the narrow statutory class of permissible takers to seep down to an enlarged class of sub-beneficiaries created not by the Act itself but by intended beneficiaries' testamentary plans. Courts may not flout so unmistakable a legislative purpose, expressed in so clear a congressional command.

The District Court distinguished the *Henning* case on this point upon the ground that it was based on "explicit provisions" of the 1940 Act and upon the legislative policy of restricting beneficiaries' rights, broadened by the 1946 amendments. But as we have seen above, that policy was broadened only with respect to beneficiaries entitled to lump-sum payment, and as for the "explicit provisions" of the Act, suffice it to

say that two lower courts did not think the provisions were very explicit [9] having decided the case the other ~~say that two lower courts did not think the provisions~~ "ambiguous." 334 U.S. at 610.

In *United States* v. *Citizens Loan & Trust Company,* 316 U.S. 209, 215, the Supreme Court was faced with a similar problem involving administrative delay under the World War Veterans' Act of 1924. The court there said:

> The Court of Appeals was evidently impressed by the delay in the settlement of respondent's claim. We share that concern. The insured died almost 23 years ago and final disposition of the case is only now in view. But responsibility for the delay is not easily apportioned. And in any event, it could not influence our construction of the language of the statute. [Footnote omitted]

These decisions make it plain therefore that although the result in a particular case may be harsh,[10] the delay necessitated by administrative problems in an agency handling the vast numbers of applicants and the huge amounts of money that the Veterans Administration

---

[9] See pp. 20-1, *supra.*

[10] The apparent harshness caused by delay in this case is of course not nearly so great as existed in the *Henning* case where the family of the insured was deprived of any proceeds in favor of the Government Fund. In this case the results of the delay (about 9 months) was to deprive Mrs. Short, the insured's mother, of the use of $2600 (see n. 2, *supra*) during the last months of her life. However, even under the Veterans Administration's ruling in this case, half of that amount would remain in the family, going to James Harvey Short, the insured's brother. The other half would be paid to Berkshire Industrial Farm, a charitable institution in New York. The insured had apparently become interested in this farm and had designated it as a contingent beneficiary under his National Service Life Insurance policy (R. 100).

handles cannot alter the construction of a statute or the applicability of regulations promulgated by the Administrator. Of course, the delay in this case was not a result of any deliberate intent to deprive Mrs. Short of the insurance proceeds but was caused by difficulty in obtaining certification of the insured's death. Although requests were made to the appropriate agencies by the Veterans Administration the official certification of death was not received from the State Department until July, 1951, a month after Mrs. Short had died. Until that certificate arrived, the Veterans Administration's rules would permit it to do nothing to process Mrs. Short's claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed.

WARREN E. BURGER,
Assistant Attorney General

LLOYD H. BURKE,
United States Attorney

MELVIN RICHTER,
JULIAN H. SINGMAN,
Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 343254 1391

No. 14,668

United States Court of Appeals

For the Ninth Circuit

United States of America,
Appellant,

vs.

Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

James Harvey Short, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,
Appellant,

vs.

Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF OF JAMES HARVEY SHORT, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF IRVING RITCHIE SHORT, DECEASED.

Francis T. Cornish,
Cornish & Cornish,
610 American Trust Company Building,
Berkeley 4, California,
Attorneys for James Harvey Short, individually and as Administrator of the Estate of Irving Ritchie Short, Deceased.

FILE
JUN 23
PAUL P. O'BRIEN,

Pernau-Walsh Printing Co., San Francisco, California

No. 14,668

United States Court of Appeals
For the Ninth Circuit

United States of America,
Appellant,
vs.
Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

James Harvey Short, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,
Appellant,
vs.
Margaret D. Short, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF OF JAMES HARVEY SHORT, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF IRVING RITCHIE SHORT, DECEASED.

Ethel Grace Short, the deceased primary beneficiary in the policy involved, had two sons, the insured veteran, Irving Ritchie Short, and James Harvey Short, the latter being one of the contingent beneficiaries

named in the policy involved. Both decedents died intestate.

The mother was the sole heir at law of Irving, and James Harvey Short is the sole heir at law of and administrator of the estate of Irving. His wife, the plaintiff, Margaret D. Short, is administratrix of the mother's estate.

The relationships herein set out were stipulated to. (R. pp. 53 and 54.)

The complaint filed by Margaret D. Short, as administratrix of the estate of Ethel G. Short, alleges the possible rights of James Harvey Short (R. p. 30) and prayed that the rights of all parties be determined (R. p. 32.) The answer of James Harvey Short, individually and as administrator, pleaded the facts as they had been pleaded by said administratrix and made the same prayer. (R. pp. 48 and 49.)

As defendant, James Harvey Short, claimed any such rights as he may have as contingent beneficiary and as administrator of the veteran's estate. And on behalf of said estate, he points out that subsection (u), which was added to Section 602 of the Act of 1940 by Section 9 of the 1946 Act, here involved, declares that the entire policy is payable to him as administrator of the veteran's estate. He simply asserts that if subsection (u) is to be applied exactly as it reads, the court must hold that the value of the installment payments due at the date of the death of Mrs. Short on June 14, 1951 should be paid to the veteran's estate. That would be in line with the holding in the

Henning case (344 U.S. 66), that the terms of the statute must be strictly followed. If, however, it is implied that the insured could appoint the two contingent beneficiaries and thus eliminate the command referred to, said defendant earnestly urges that it may not be further implied that they would be entitled to the installments on the policy which accrued while the mother was living and which remained uncollected while she was endeavoring to have the death of the son established.

Dated, Berkeley, California,
June 20, 1955.

Respectfully submitted,
FRANCIS T. CORNISH,
CORNISH & CORNISH,
Attorneys for James Harvey Short, individually and as Administrator of the Estate of Irving Ritchie Short, Deceased.

No. 14,668

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased,
Appellant,
vs.
MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF OF MARGARET D. SHORT, ADMINISTRATRIX OF THE ESTATE OF ETHEL GRACE SHORT, DECEASED.

GEORGE CLARK,
CLARK & MORTON,
610 American Trust Company Building,
Berkeley 4, California,
Attorneys for Appellee.

FILED
JUN 23 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Preliminary Statement 1

Important Changes in the 1940 Act.................... 6

Argument of Point I.. 8

Argument of Point II.. 25

Table of Authorities Cited

Cases

Pages

Diamuke v. United States, 297 U.S. 167, 80 L. ed. 561, 56 S. Ct. 594 .... 8, 18

Ex Parte Pub. Nat. Bank, 278 U.S. 101, 73 L. ed. 202, 48 S. Ct. 43 32

McCullock v. Smith, 293 U.S. 228, 79 L. ed. 297, 55 S. Ct. 167 30

Shaughnessy v. Pedreiso, ... U.S. ...., 99 L. ed. Advance Reports, 487 25

Singleton v. Cheek, 284 U.S. 493, 76 L. ed. 419, 52 S. Ct. 257, 81 A. L. R. 923 30

Townsend v. Little, 109 U.S. 504, 27 L. ed. 1012, 3 S. Ct. 357 35

U. S. v. Henning, 34 U.S. 66, 73 S. Ct. 114, 97 L. ed. 101 .... 30, 32, 36, 38

U. S. v. Hoth, 207 F. 2d 386 6

United States v. Citizens Loan & Trust Co., 316 U.S. 209, 86 L. ed. 1387, 62 S. Ct. 1026 30

U. S. v. Snyder, 177 F. 2d 442 6

U. S. v. Zazove, 334 U.S. 602, 92 L. ed. 1601, 68 S. Ct. 1284 29

Statutes

National Service Life Insurance Act of 1940 (54 Stat. 1009) 2

Section 602 2

Section 602(h) 6, 32

Section 602(h)(1), (2) 27

Section 602(h)(3) 6

Section 602(i) 32, 34

Section 602(j) 36, 37, 39

Section 602(k) 34, 37, 39

Section 602(t) 6, 7, 25, 32

Section 602(u) 7, 25, 27, 28, 29, 31, 34, 37, 38, 39

Insurance Act of 1946 (60 Stat. 781) 2

Section 4 .... 24, 33

Pages

Section 5(a) 6
Section 5(b) 7, 26, 27, 28, 29, 32, 33, 34, 36, 37, 39
Section 5(i) and (j)................................26, 27

63 Stat. 74, Chapter 135.............................. 31

U.S.C., Section 801, Title 38...........................2, 33, 34

U.S.C.A., Title 38, page 788........................... 31

Texts

50 Am. Jur., Section 367, page 371...................... 35

54 Am. Jur., Section 41, page 557....................... 36

3 A.L.R. 2d 851....................................... 29

55 A.L.R. 592.. 27

73 A.L.R. 328.. 27

97 A.L.R. 1804... 27

147 A.L.R. 1201.. 27

37 Corpus Juris 573.................................... 30

59 Corpus Juris 974.................................... 34

No. 14,668

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased, *Appellee.*	
JAMES HARVEY SHORT, Individually and as Administrator of the Estate of Irving Ritchie Short, Deceased, *Appellant,* vs. MARGARET D. SHORT, as Administratrix of the Estate of Ethel Grace Short, Deceased, *Appellee.*	

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF OF MARGARET D. SHORT, ADMINISTRATRIX OF THE ESTATE OF ETHEL GRACE SHORT, DECEASED.

PRELIMINARY STATEMENT.

The suit involves claims upon a policy of life insurance, dated January 1, 1943, which was issued upon the life of Irving Ritchie Short, a World War

II veteran, under the National Service Life Insurance Act of 1940. (54 Stat. 1009.) The said 1940 Act was amended and supplemented by the Insurance Act of 1946. (60 Stat. 781.) (In each case the title of the Act appears at the end thereof.) The 1946 Act contains provisions which deal with veterans' insurance which matured on or after August 1, 1946, the effective date of said act.

The case was heard upon a Stipulation of Facts and the admissions of the pleadings. (R. p 51.)

The veteran died on August 30, 1950. (Stipulation, Item 1, R. p. 52.) When the insured under such a policy dies, the insurance is deemed matured. (180 Fed. 2d, 217.)

The two acts mentioned have been codified in a series of sections, beginning with Section 801, Title 38, U.S.C. The main section of the 1940 Act is Section 602, which contains various lettered subsections. These subsections were amended and added to by Sections of the 1946 Act. It will aid the discussion to refer to the original acts and not to the code sections.

The policy is in the sum of $10,000. (R. p 5.) It named the veteran's mother, Ethel Grace Short, as principal beneficiary (R. p. 6) and, by an amendment, it named his brother, James Harvey Short, and Berkshire Industrial Farm of Canaan New York as equal contingent beneficiaries. (Stipulation, Item 3, R. p. 53.)

Mrs. Short, the principal beneficiary, filed a claim upon this policy. As the veteran did not direct that the

policy should be payable in a lump sum and did not select any of three additional methods of payment mentioned in Subsection (t) of the Act of 1946, added by Section 9 to Section 602 of the 1940 Act, the policy became payable in 36 equal monthly installments, pursuant to a designation which the statute did permit Mrs. Short, as primary beneficiary, to make. (Item 15, Stipulation, R. p 62.) The total of the installment payments aggregated slightly over $10,000, because the government allows something for interest on deferred payments.

Mrs. Short died on June 14, 1951, while action on her claim was pending. (R. p. 70, Item 25.) The Veterans Administration had not as yet passed on the claim. Its position was that it must first obtain proof from the War Department as to whether the veteran was in the Army at the time of his death and that if he was not, it must have proof of the veteran's death from the "proper service department", which it held was the State Department. It claimed that it took it until June 18, 1951 to get the required report from the War Department and that it thereupon requested a report of the death from the State Department. (See Items 24 and 26, Stipulation, Record, pages 69 and 70.) This was four days after Mrs. Short died. It claimed that it thereupon obtained the report of death from the State Department on July 3, 1951. (For these matters, see Item 24 of Stipulation, R. pages 69 and 70.) Its requirement as to procedure was simply unauthorized. Its delay was wholly unnecessary, and it was fatal to Mrs. Short's claim if the appellant's

position is right, for that position would make actual collection of her claim essential to her right thereto and her estate could have no interest therein, regardless of the cause of the delay. The Veterans Administration determined said fact of death shortly after Mrs. Short died, but on being advised of Mrs. Short's death, it ruled that nothing was payable on the policy to Mrs. Short's estate; that the whole of it, including the payments already accrued, was payable to the two contingent beneficiaries. (Item 27, Stipulation, R. p 70.) But note the time that was utterly wasted in getting the unneeded report from the War Department.

Said administrative hearing by the Veterans Administration may be attacked. It is attacked here. But for the waste of time in finding the death of the veteran, the ten installments of the insurance awarded to plaintiff by the judgment appealed from would have been paid before Mrs. Short died and the technical argument here made would have no foundation. We shall show as our first point that at least since the passage of the 1946 Act, the fairness and legality of the said hearing may be attacked.

And this brings up the further argument under our first point. In view of the change in the policy of the law as represented by the 1946 Act, is a claimant, such as was Mrs. Short, to be deprived of all right by death if it is perfectly clear that he proceeded in good faith and with ordinary diligence in trying to have his claim passed on? Had this case been dragged out nearly three years and Mrs. Short had died before

payment, about the whole policy would have passed to contingent beneficiaries, if appellant is right. We submit the policy of the law as laid down in the *Henning* case was definitely changed by the 1946 Act.

Margaret D. Short, as Administratrix of the estate of Ethel Grace Short, filed this suit after the final rejection of the claim. Said rejection was on the ground that, as the claimant had died, she could not collect the claim and that such collection was necessary to perfect the claim. (R. pages 70 and 71.) The complaint named as defendants the United States and the two contingent beneficiaries above referred to and also James Harvey Short individually and as Administrator of the estate of Irving Ritchie Short. All defendants answered.

The District Court's judgment (R. p 102) awards to plaintiff the installments that accrued on the policy prior to Mrs. Short's death and divides the balance equally between the contingent beneficiaries. It overruled the government's contention that the whole of the installments must be paid to the contingent beneficiaries. Its opinion was made a part of the findings and conclusions of law. (R. p. 82.)

Berkshire Industrial Farm has not appealed, but the government is virtually appealing on its behalf. James Harvey Short appealed individually and as Administrator of the insured's estate. He did not designate a record on appeal. He gave a cost bond. The present record presents the entire case. He asks that the judgment be affirmed and, if not affirmed, that the entire insurance shall be awarded to the veteran's

estate. In view of the provisions of the law which have abolished restrictions on designating beneficiaries of a policy that has matured, something may be said on the point that where a case evidences no collusion and has been ably and carefully considered, the government should consider itself as a stakeholder. Of course we have noted the cases of *U. S. v. Snyder,* 177 F. 2d, 442, and *U. S. v. Hoth,* 207 F. 2d, 386, which may indicate the contrary.

Important Changes in the 1940 Act.

Prior to the 1946 Act, all insurance subject to the 1940 Act was payable in installments only. See subsection (h) of Section 602 of the 1940 Act. Said subsection (h) was amended by Section 5(a) of the 1946 Act, but not in the respect mentioned, insofar as insurance already matured was concerned. The insurance here involved matured on August 20, 1950, that being the date of the death of the veteran, and subsection (t), which was added to the 1940 Act by Section 9 of the 1946 Act, provided that all insurance subject to the 1940 Act *which matured on or after the passage of the 1946 Act,* which was August 1, 1946, could be made payable at the option of the insured in any one of four methods: In a lump sum, or in any of three additional methods, each of which required payment of the insurance in installments. Section 4 of the 1946 Act explicitly repealed all restrictions on designating beneficiaries in case the insurance matured after the enactment of the 1946 Act took effect. The existing restrictions were prescribed in Subsection (h) (3) of Section 602 of the 1940 Act.

All old policies yet to mature and all new policies came under the liberal provisions of the 1946 Act. All matured policies remained subject to the 1940 Act.

Section 5(b) of the 1946 Act and Subsection (u) of Section 602, added to the 1940 Act by Section 9 of the 1946 Act, will be considered in the argument which follows.

This reply brief makes two points.

I. The failure to approve the claim of Ethel Grace Short in her lifetime, so as to permit the same to be paid was the result of the unauthorized and arbitrary conduct of the Veterans Administration and consequently the claim should be recognized as valid if it is otherwise the law that, to be entitled to installments that accrued on the policy in her lifetime, she had to collect the same and her estate had no interest therein.

Where the claimant has proceeded in good faith to enforce his claim, the drastic rule of the *Henning* case does not apply to failure to collect the claim.

II. The able and careful opinion of the District Court correctly construes Subsection (u) of Section 602. It shows that that subsection furnishes no support whatever for this appeal. It properly refers to Section 5(b) of the 1946 Act and gives its principle correct application.

ARGUMENT OF POINT I.

When at an administrative hearing, such as the law here provided, evidence adequate to establish a claim is presented or if it is offered and the offer ignored or if such a hearing is needlessly postponed until mere delay destroys the claim, the claim should be treated as an established claim. In such a situation, it is required that the administrative body that passes on the claim shall—

> "* * * follow a procedure which satisfies elementary standards and reasonableness essential to the due conduct of the proceeding which Congress has authorized."

Chief Justice Stone in

Diamuke v. United States, 297 U.S. 167, 80 L. ed. 561, 56 S. Ct. 594.

Specifically, the Supreme Court ruled that the administrative tribunal which was authorized to pass on a claim for retirement pay could not ignore uncontradicted evidence as to what it was supposed to find, that it was required to proceed fairly. The District Court was upheld and the Circuit Court reversed.

Here, the Veterans Administration ignored proof of the veteran's death, ignored offers of further proofs and adopted a method of procedure that was not sanctioned by any law or regulation and that improperly postponed its determination until after Ethel Grace Short died, thereby defeating (if and only if appellant is right on the law) the claimant's demand by mere delay. The delayed hearing became

no hearing because right to the demand depended on its collection by the claimant in her lifetime, if the appellant is right.

The Veterans Administration ruled that it must first have proof from the War Department as to whether Irving Ritchie Short was in the service of the Army at the time of his death and that if this proof showed he was not in such service, the proof of death should be furnished by the State Department. The rulings were unauthorized and they caused the delay. The first proof was not obtained until about four days after the claimant died, which was on June 14, 1951. (Item 25, R. p. 70.) The veteran died on August 30, 1950. (Stipulation, Item 1, R. p. 52.)

Under the 1940 Act and the ruling thereon in the *Henning* case, mere delay—however unauthorized—in acting on a claim was permitted to defeat it. Collection by designated living beneficiaries was the essence of the law. The "ladder of priority" had to be maintained. We urge that this requirement was abolished by the 1946 Act, in so far as this claim is concerned.

What are the facts as to hearing?

It is admitted that Irving Ritchie Short died on August 30, 1950. (Item 1, Stipulation, R. p. 52.) He was a veteran of World War II. (Same item.) The circumstances of his death are shown in Item 8 of the stipulation. (R. pp. 54 to 59.) He had taken his discharge from the Army. At the outbreak of the Korean War, he was in Formosa. He went from there to Tokio to again enter active service. A med-

ical examination was required. This showed he was seriously ill. His symptoms indicated polio. His brother, the defendant, James Harvey Short, a soldier on his way to Korea, was in Tokio. It was realized that proper medical care required placing the veteran in the United States Army Hospital in Tokio. That was done. He died within a few days.

It should be observed at this point that certain of the forms in use by the Veterans Administration for filing claims based upon the death of a veteran specifically state that proof of death shall not be required if the death occurred in a government institution. It would seem that a veteran is entitled to arrange to draw upon his policy of insurance and to receive fixed payments in the event of his disability. He may die and substantial amounts may have accrued in his favor. Form No. 8-614 relates to an application for accrued benefits by a veteran's widow, child or children or a dependent parent. On this form there is printed the following: "Specific Instructions: Proof of Death. Death of a veteran in a government institution need not be proven by a claimant. Otherwise a certified copy of a public record of death should be furnished." Form number 8-551 is a similar form of claim, the payment of which depends upon the death of a veteran and similar procedure is permissible. The form of claim which they furnished to Mrs. Short to sign and which she did sign has at the bottom V. A. Form 8-355c. It has at the top "Claim for National Service Life Insurance." It has blanks for filling in, like a private company form, and about halfway down it has the following:

> "Section II. Certificate of Identification.
> Note: Execution of Section II is unnecessary if insured died in active service or in a hospital under the jurisdiction of the United States Government. To be executed by a disinterested person."

Then came Section II consisting of blanks with the following printed guides:

> "Name and address of Identifying person.
> Age of Identifying person.
> Name of insured.
> Length of acquaintance with insured.
> Place of death of insured.
> Date of insured's death.
> I have seen the body and know it to be the body of the above-named deceased. The statements made herein are made with full knowledge of the penalties imposed by law for making a false statement of a material fact."
>
> ....
>
> Signature."

The Veterans Administration was immediately advised of the death of Irving Ritchie Short in the Army Hospital referred to. Indeed, the Veterans Administration was later furnished with a death certificate executed by the physician of the Tokio Hospital. (See Stipulation, R. p. 68.) The certificate was not sworn to but no objection to the failure to swear to this certificate was ever made. (R. p. 69, middle of page.) Had it been made, it could have been corrected at once. In ordinary insurance, these certificates are not sworn to.

Moreover, when they call on a government hospital for proof of death, no requirement of any law or regulation said that the information they received had to be sworn to. When they got from the War Department the proof that the veteran had been discharged from the Army, that proof did not have to be sworn to.

Mrs. Short, in sending in her claim, assumed Section II did not have to be filled out.

The death telegram sent by the adjutant's general's office is dated August 31, 1950. It recited the insured had been hospitalized. (See Stipulation, R. p. 56.) The telegram is in a form which would have been sent had the applicant passed the physical examination and been sworn in before death. The fact that he did not get into the Army is rather immaterial. He was trying to.

The telegram was forwarded to the Veterans Administration about October 18, 1950. (Item 10, R. p. 60.)

A question arose as to shipping the veteran's body home to Berkeley. The brother, James Harvey Short, was present, and it was determined that the body could not be shipped home by the Army because the veteran was not back in the service, but that this would have to be handled by the State Department.

On September 20, 1950, the State Department sent to the mother, Ethel Grace Short, a speed letter, addressed to her at 1386 Euclid Avenue, Berkeley, California. This letter is copied in the record at

pages 57 and 58 and it shows that it was definitely determined, by the time of the writing of the letter, to-wit, September 20, 1950, that the veteran was not in the service and that Mrs. Short would have to provide the State Department with $500.00 to cover the expense in connection with the shipping of the body home to Berkeley and that she must also furnish the name and address of an undertaker who would receive the remains at destination. (R. pp. 57 and 58.) So it was a perfectly simple matter to determine whether the veteran was in the Army and if, as the Veterans Administration contended, that made it necessary to request of the State Department the furnishing of evidence of death, there was no excuse for starting inquiry Number 2, months and months after arranging for the shipping of the body and not before Mrs. Short died. (R. pp. 69, 70.)

It is stipulated (R. 59) that Mrs. Short sent the money required and furnished the name of the undertaker who would receive the remains on arrival at the Presidio in San Francisco and that the body was shipped aboard the U. S. Ship The General Gaffey; that it arrived in Berkeley and was buried there. (R. p 59.)

Item 9 of the Stipulation (R. p 56) recites the filing of the claim on the policy at the Oakland Office of the Veterans Administration about September 15, 1950. The claim was left at the Oakland Office, *together with the original of the telegram hereinbefore referred to.* The claim and the telegram were sent to the head office in Washington. (R., Item 10, page 60.)

Item 12 of the Stipulation (R. p 60) shows that on November 1, 1950, the attorneys for Mrs. Short wrote the Veterans Administration, stating that the claim had been sent on to Washington. The letter further recited that the veteran had gone from Formosa to Tokio "to again enter the service". (R. p. 61.)

Said letter also stated that on his taking the required medical examination, it was found the veteran had polio *and was placed in the U. S. Army Hospital in Tokio, where he died within a few days. The letter stated that Mrs. Short was not well and it was requested that her claim should be given special attention.* (R. p 61.)

So here they were advised that the death occurred in the U. S. Army Hospital in Tokio, while the veteran was trying to get back in the service.

On November 17, 1950, the reply to this letter came and it called attention to the fact that Mrs. Short had failed to sign the claim which she had filed in Oakland. A blank form of claim was enclosed.

Item 14, page 62 of the Record, shows that Mrs. Short's attorneys sent the duly executed claim on to Washington on November 24, 1950. Section II was not filled in. The form used was that hereinbefore described.

Item 15, page 62 of the Record, shows that Mrs. Short designated that the claim should be paid in 36 equal monthly installments.

Item 17, page 62 of the Record, shows that on October 5, 1950 Mrs. Short wrote to the Adjutant General

of the United States Army, indicating that she understood her son had gone from Formosa to Tokio under orders from the War Department and she urged that this would virtually place him in the service before he died and she complained of the inflicting on her of the expense of shipping the body home. The same Item 17 shows that the Adjutant General's Office answered Mrs. Short's letter on December 6, 1950, stating that Irving Short had

> "not re-entered the army at the time of his death and that there was no authority for the Department of the Army to reimburse Mrs. Short for her expenses incident to his death."

The said letter further stated:

> "Your son's remains are being returned to the United States aboard the U. S. N. S. General Gaffey, which departed from Yokohama, Japan, on December 2, 1950, and is scheduled to arrive at the San Francisco Port of Embarkation, Fort Mason, California, on or about 12th December, 1950. His remains were shipped on space available basis which will relieve you of paying the cost of ocean transportation."

So before the year was up the Army knew and acted upon the fact the veteran was not in the Army. If the Army could promptly send such a letter to Mrs. Short, it is inconceivable that the Army could not have sent like information to the Veterans Administration in a very short time.

Mrs. Short wrote to the Veterans Administration about her claim and, on December 22, 1950, they replied (R. p. 63), stating:

> "This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

This statement last quoted was on a printed form. The communication concluded

> "You will be further advised at the earliest possible date."

Item 19, page 64 of the Record shows that Mrs. Short wrote saying that she had heard nothing further and that on February 21, 1951, her attorneys sent a similar letter and that about March 5, 1951 the attorneys received a printed form of letter from the Veterans Administration reading:

> "Action on this claim is pending receipt of an official report of death from the Service Department."

Item 20, pages 64 and 65 shows that on March 31, 1951, the attorneys for Mrs. Short wrote the Administration, saying

> "What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs."

Our offer to help was simply ignored and they had been advised that Mrs. Short was seriously ill.

Paragraph 13 of the complaint contains a fuller statement of our letter of March 31, 1951 than does the Stipulation and Paragraph 13 of the complaint was admitted by the appellant's answer. (R. p. 35, Par. 8 of the Answer.) We copy from the said Paragraph 13 (R. pp. 18 to 20):

"Your letter dated March 5, 1951, which was in response to our letter of February 18, 1951, certainly does not offer much comfort to this young man's mother, who is seriously ill and who, we feel, is entitled to know the cause of the delay. All that your letter of March 5, 1951, states is:

> "'6. Action on this claim is pending receipt of an official report of death from the Service Department.'

"What is the real point of the objection here, and can we not do something here at this end in supplying the information that your office needs?

"Will you please let us know what is meant by the expression quoted?"

Said letter also contained the following:

"Harvey Short, his brother, was in Tokio when Irving Short arrived. The medical examination showed Irving had polio. He died very soon after this examination and while in the government hospital. Harvey wired his mother that the remains would be sent on by the Army. After considerable delay, a speed letter came from the State Department saying *that Irving was not back in the service at his death* and that Mrs. Short must send $500.00 to meet the expense of returning the body. We attended to the sending of this money, but we complained because it struck us that Irving was, for all practical purposes, serving his country when he died and we thought the argument made was very unjust. Weeks and weeks passed before the shipment occurred. After pleading for information, a letter dated December 6, 1950, finally came from the Adjutant General's Office to Mrs. Short. The

> letter stated that space for shipment of the remains on the General Gaffey had been arranged.
>
> The funeral occurred here. Are you concerned over proof of death? The son, Irving Short, is buried here.
>
> Why cannot the mother be advised as to what is the real cause of this great additional delay, so that she can help in supplying any information that you may need?"

Note the last words of the foregoing letter.

The Court will note that the Circuit Court, in the case of *Diamuke v. United States,* cited at page 8, hereof, ruled that the law intended that the action of the administrative tribunal should be final and that this was overruled; that the law construed called for a reasonable hearing.

Item 21, page 65 shows that Mrs. Short herself complained and that the Veterans Administration replied on April 24, 1951 that

> "It is necessary under Veterans' Administration regulation that there be of record proof of death of the above-named veteran."

Here this veteran had died. Had died in the government hospital and there was lying in the office of the Veterans Administration the death telegram hereinbefore mentioned. His brother was there in Tokio when he died. Arrangements were made to ship the body home. Why suggest that the roundabout method of proving the death of this veteran had to be pursued? The letter proceeds to state that the Veterans

Administration is endeavoring to obtain an official report of death from the Service Department. That meant the War Department. We quote:

> "This office is endeavoring to obtain an official report of death from the Service Department, however, it seems that the delay in furnishing the same is due to the fact there is a question as to whether or not the above-named veteran was in the military service at the time of his death. If the above-named veteran was not in the military service at the time of his death, it will be necessary that you obtain proof of death through the State Department, Washington, D. C.
>
> Upon receipt of information requested by this office from the Service Department relative to a report of death of the above-named veteran, further consideration will be given your claim and you will be advised."

It was not necessary that Mrs. Short should obtain proof of death through the State Department and it particularly was not necessary for the Veterans Administration to delay the case by an application to the State Department for proof of death made only after the War Department determined he was not in the service when he died.

There was no necessity for this and no regulation that did or could require it.

Mrs. Short's attorneys again wrote the Veterans Administration on May 15, 1951, wherein they distinctly offered to supply proof of burial of the veteran. Said letter (Item 22, R. p. 67) contained the following:

> "Everybody knows the boy is dead. The State Department, after great delay, finally shipped the body. He was buried here through Funeral Director Albert M. Brown & Co. We can supply you with proof of the burial."

But they took over. The last named letter further stated:

> "In fairness to Mrs. Short, it appears that action on this claim is bogged down by a purely technical question of procedure and, as we construe your letter, a decision must first be reached as to whether Irving Short was in the military service, and then apparently the question of some type of follow-up proof as to death must originate out of the War Department, but if it is determined that Irving R. Short was not in the military service, then the proof of death must be supplied by the State Department. Of course, so far as this death claim is concerned, the material fact is that Irving Short is dead." (R. p. 67.)

In view of the delay, Mrs. Short should have been told at once to go ahead and supply proof of death.

Why did they not write to the hospital? We are advised that, although they have changed their form of claim, they do send for a report from any government hospital in which the veteran may have died.

Mrs. Short was nearing the end of her life. We forwarded air mail stamped envelopes to the Veterans Administration. They simply would not use them. They sent them back.

Item 23, page 66 shows that with the letter of May 15, 1951 we forwarded a doctor's certificate in the

usual form, executed by the physician in the Tokio Hospital who had attended to the case. This certificate is set out at pages 68 and 69 of the record. It was in a form which has been used for years by Prudential Insurance Company of America. It shows the home address, the cause of death, the duration of the illness, and the date of death, and the date of the birth of the decedent and the place of death and the place or date of the first treatment and the date of the last treatment. We are told that this certificate was not verified, and that is correct, but it was not objected to and even on May 15 we could have wired the signer, Dr. Robert S. Chestnut, for a new certificate. Moreover, it is in the form which a government hospital must use to show the death of a veteran patient. And present objection to the certificate shows we should have been permitted to help out from the very first and that the red tape procedure was simply unauthorized.

Page 68 of the record shows that the Prudential Insurance Company was willing to act, and it did act upon the telegram in paying a policy of insurance. It returned to Mrs. Short both the telegram and the physician's certificate.

Item 24, page 69 of the records shows that on June 18, 1951, which was after the veteran died, the Veterans Administration received a report from the Army stating that Irving Ritchie Short was not in active service at the time of his death and, consistently with the manner in which Mrs. Short had been rebuffed, the Veterans Administration placed in its letter of June 18, 1951 the following:

"As previously stated, an official report of death is required before this insurance may be settled. The Veterans Administration has this date requested an official report of death from the State Department. When this evidence is on file, prompt action will be taken on the claim."

Item 25, page 70: Mrs. Short died on June 14, 1951 and the attorneys at once mailed a letter to the Veterans Administration advising them of that fact.

Where is the law or the regulation that says that proof of death had to be an official report from the State Department?

Item 26, page 70 shows that on July 3, 1951, the State Department reported to the Veterans Administration that Irving Ritchie Short was dead.

So the information from the State Department was almost immediately available.

Item 27, page 76 shows the ruling that Mrs. Short's estate is entitled to nothing.

We do not believe there is a parallel for the treatment that was accorded to the claim of Mrs. Short.

How far is it from the State Department buildings in Washington to the Veterans Administration office?

How long does it take a person, who is employed in the Veterans Administration, to pick up the phone and inquire of someone in the State Department for the purpose of finding out whether, as recited in the letters brought to the attention of the Veterans Administration, the State Department had compelled Mrs. Short to pay the expense of shipping her son's

body home because he was not as yet in the service at the time of his death.

As already indicated (Item 18, page 63 of the Record), the Veterans Administration, on December 22, 1950, wrote Mrs. Short:

> "This matter is receiving our attention. Further action awaits evidence which is being obtained by this office."

That was before Christmas.

The balance of December, January, February and March passed and the form letters came indicating the same thing. (R. p. 64.)

On April 24, 1951 (R. pp. 65 and 66) came the letter that showed they were inquiring as to whether the insured had died while in the service. We refer to the letter of April 24, 1951. (R. p. 65.)

Then finally on June 18, 1951 (R. p. 69) they wrote Mrs. Short a letter, which she never received because of her death, that the report from the Army stated that the veteran was not in active service at the time of his death.

On July 3, 1951 the State Department sent the Veterans Administration an official report of the death of Irving Ritchie Short. (Item 26, R. p. 70.)

That was but two weeks after the Veterans Administration had written to Mrs. Short (R. p. 69) that it had received the report that her son was not in active service at the time of his death. (R. p. 69.) So all this delay was delay in obtaining information

which the State Department provided, almost immediately following the death of Ethel Grace Short.

What is there about the Army records that prevented a prompt report as to whether this young man was honorably discharged and was off the lists? It is just asking a Court to believe there are no records. He was paid when he was in the Army and they have payrolls. How long did it take the State Department to bill Mrs. Short for the $500.00? Were the same inquisitors dead? Were the same sources of information closed? How long did it take the adjutant general to write Mrs. Short she could not be repaid the expense, because Irving Short was not back in the Army? Why tie the matter up in red tape when it was Mrs. Short who was claiming?

Why rebuff Mrs. Short when she was obviously able to send any proof of death they were willing to suggest?

And finally under this head we urge that, as Section 4 of the 1946 Act destroyed the theory of the 1940 law that the payee of the insurance can be only persons of a restricted class, there is sound reason for holding that a contingent beneficiary may not take advantage of excusable delay in the collection of installments by the beneficiary who predeceased him. A rule should fail when the reason for it fails. How little the personal element enters into the payment is shown by the fact that following August 1, 1946 the veteran could designate as taker a trustee who does not die or a corporation wholly owned by the beneficiary. What was given to Berkshire Industrial

Farm could not be lost for failure to collect before death. But appellant contends a different rule could apply to James Harvey Short. Appellant contends that where the facts are otherwise exactly the same mere speed in collection determines the right to the installment. That is construction which does not in fact achieve real equality. (The end of Subsection (t) require certain types of beneficiaries in certain cases, but that is only because the kind of insurance mentioned in the third and fourth options requires beneficiaries capable of death.)

It is now provided that the Court can review an improper administrative order which is not made final by the statute.

> *Shaughnessy v. Pedreiso,* .... U.S. ...., 99 L. ed. Advance Reports, 487.

ARGUMENT OF POINT II.

In an able and most careful opinion, the learned District Court has construed the law and we shall try to limit our discussion of our Point II.

Subsection (u), added to Section 602 of the 1940 Act by the 1946 Act, provides for sending certain installments of insurance that have accrued in the lifetime of the principal beneficiary to the estate of the insured. It assumes non-existence of a contingent beneficiary and tells where said installments and the balance of the policy shall go in a single sum.

Section 5(b) of the 1946 Act determines, through reference to Subsections (i) and (j), that if the insurance matured on or after August 1, 1946, installments of the insurance that have accrued when the principal beneficiary dies shall be a part of the deceased beneficiary's estate and not the property of an existing contingent beneficiary or the property of the estate of the insured. The 1946 Act let the existing law continue to apply to payments on insurance already matured.

Of course, Section 5(b) does not say, in terms, that a rule contrary to Subsections (i) and (j) should apply as between successive beneficiaries of installment insurance, but this right to accrued installments was old matter up for consideration under earlier statutory provisions. There were but two rules, so far as the dead beneficiary's estate was concerned. Either the dead beneficiary's estate got the accrued installments or it did not get them, and the Senate Committee Report to which we will refer sought to and did justify the passing of the accrued payments to the deceased beneficiary's estate. That is what they were talking about and if the *Henning* case had been decided, they would have referred to that.

When the Administrator of Veterans Affairs promulgated his regulations, he should have noted that subsections (i) and (j) provided that neither the beneficiary of installment insurance or the beneficiary's estate could have a right to accrued installments of that insurance, unless the beneficiary collected them before dying and that that rule was

made and changed from time to time in enacting and in amending veterans' insurance acts. There are several annotations on cases decided under these acts. We refer to a heading used in the annotations in certain volumes of A.L.R. and we refer to the volumes.

"VII Payment on Death of Beneficiary
(a) Accrued Installments."

55 A. L. R., page 592;
73 A. L. R., page 328;
97 A. L. R., page 1804;
147 A. L. R., page 1201.

It perhaps may be said there is no conflict here between different parts of the 1946 Act because Section 5(b) deals with the rights of contingent beneficiaries to installment payments, but if there is, then Section 5(b) states the general rule and it may stand while subsection (u) may apply in the particular situation therein defined. Section 5(b) pointed to a rule that would continue to be applied continuously to insurance being paid—the installment insurance of the 1940 Act that had already matured. There was considerable of this and it was governed by Subsections (i) and (j), referred to in Section 5(b). Under Subsection (h), Paragraphs (1) and (2) of the 1940 Act, as amended by the 1946 Act, this already matured installment insurance would be payable under an unexpired period of either 240 months or 120 months. As we have urged, all insurance of the 1940 Act was installment insurance. Section 5(b) shows awareness of the harsh and dangerous parts of the

old rule and said they should not apply to policies such as the one here involved. It was most pointed legislation and, because Subsection (u) does, under the one particular state of facts which it specifies, apply the harsh rule of the *Henning* case, is no reason for ignoring Section 5(b).

There is not a single sentence in the 1946 Act that gives accrued installments to a contingent beneficiary. As amended on May 23, 1949, Subsection (u) reads:

> "* * * and in any case in which no beneficiary is designated or the designated beneficiary does not survive the insured or a designated beneficiary not entitled to a lump sum settlement survives the insured and dies before receiving all the benefits due and payable, the commuted value of the remaining unpaid insurance, whether accrued or not, shall be paid in one sum to the estate of the insured," etc.

The sentence requires for its operation that someone shall die who was designated as the recipient of the insurance installments that had accrued and were to accrue. It speaks of the "commuted value of the remaining unpaid insurance, whether accrued or not", and it says that all of it shall be paid in one sum to the estate of the insured.

It requires misapplying this law to say that it picks up the ten installments here involved and puts them in the hands of the contingent beneficiaries and that they then may proceed with the collection in their own behalf of the balance of the payments. If we try to say it is indeed logical to hold these contingent beneficiaries were substituted for the primary bene-

ficiary's estate, when the primary beneficiary died, that deduction obviously can not be based on Subsection (u) for the only sending of the accrued installments that it provides is a sending of them in one package or more tightly still in "one sum" to the estate of the insured.

Judge Murphy's Opinion makes it clear that Subsection (u), relied on so earnestly on the motion for new trial, is no help to appellant.

Section 5(b) of the 1946 Act must be given application to this case. It plainly relates to all insurance that has matured. It relates to rights to installment insurance provided for in the 1946 Act and not merely to lump sum insurance provided for in said Act. Such is the express wording of Section 5(b) and such is its meaning, as clearly shown by the Senate Finance Committee Report, which is hereinafter discussed.

But first let us say that the Opinion of the District Court does not assume at all that the policy of insurance here involved must be construed like a commercial insurance policy. That able Opinion recognizes that Congress provides the insurance and may change these policies. The 1946 Act depends on that rule, but it is entirely proper to say the 1946 law shows a tendency to have veterans' insurance conform more nearly to commercial insurance. The annotations in 3 A. L. R. 2d 851, on the case of *U. S. v. Zazove,* 334 U. S. 602, 92 L. ed. 1601, 68 S. Ct. 1284, show the inclination of the courts to give effect to the veterans' intention where that is possible in construing one of these policies. Twice in the majority opinion in the

Henning case, the Supreme Court said the ruling made sent the insurance other than as was intended.

The normal construction of a gift of insurance to a living person is that continuing to be alive to collect the insurance is not essential to the gift. As to ordinary insurance, see 37 Corpus Juris, p. 573.

The ruling in the *Henning* case shows that the basis for the contrary statutory rule is that Congress felt the wisdom of paying insurance to designated persons, that designating these persons was an aid to the war effort and that it would be inconsistent to permit the payments fixed upon to pass to heirs of the designated payees.

In *U. S. v. Henning,* 344 U. S. 66, 73 S. Ct. 114, 97 L. ed. 101, there are cited two cases under footnote numbered 15. They are: *McCullock v. Smith,* 293 U. S. 228, 79 L. ed. 297, 55 S. Ct. 167 and *United States v. Citizens Loan & Trust Co.,* 316 U. S. 209, 86 L. ed. 1387, 62 S. Ct. 1026. The language containing the footnote reference is:

> "And subsection (j), so as to disclaim any possible analogy to prior peace time legislation, which at one time had been construed to confer such right (15) emphasizes that 'no installments of such insurance shall be paid to the heirs or legal representatives as such of any beneficiary.' "

The *McCullock* case cites *Singleton v. Cheek,* 284 U. S. 493, 76 L. ed. 419, 52 S. Ct. 257, 81 A. L. R. 923, as being one which awarded certain accrued payments to a deceased beneficiary's estate. The statute there considered did not send the accrued payments to any other destination. The insured veteran's estate was

awarded certain payments, which payments had accrued on the policy before the veteran died, because the veteran had suffered permanent disability. The named beneficiary's estate got the payments that accrued after the veteran died and before the beneficiary died and the estate of the insured got the later installments. Here was the liberal rule. The dead veteran did not lose the right to certain of the accrued demands, because they were not paid in his lifetime. And a like rule was applied to the beneficiary. Subsection (u) sends the accrued and uncollected payments to the estate of the deceased veteran under particular circumstances. It is a special provision under which the veteran's estate is preferred over heirs of the deceased beneficiary. The subsection, as amended in 1949, is equally restricted. (See Chap. 135, 63 Stat. 74.)

Contingent beneficiaries simply are not mentioned. The comment on the 1949 amendment in Title 38 U. S. C. A., p. 788, is:

> "1949 Amendment Subsection (u), amended by Act of May 23, 1949, to make it clear that as to insurance maturing on or after August 1, 1949, which the beneficiary could not elect to receive in a lump sum settlement, any accrued installment or installments not paid to the beneficiary during his life time shall be paid to the estate of the insured rather than to the estate of the beneficiary." Title 38, U. S. C. A., p. 788.

A veteran might well prefer to let the accumulated payments go to the primary beneficiary's heirs and not pass the whole of or nearly all the payments on

to a contingent beneficiary. Litigation in the *Henning* case took seven years. Assume three years of litigation in this case. Assume it was groundless. Assume it tied up payments. Assume it was terminated in the first beneficiary's favor, but that he died five minutes before collection, no one but the contingent beneficiary would receive a dollar of the policy, if appellant is right.

It must be remembered that Subsections (i) and (j) of Section 602 of the 1940 Act which are referred to in Section 5(b) of the 1946 Act, dealt only with installment insurance. That was the only type of insurance named in Subsection (h) of the 1940 Act and it is not reasonable to say that language of such origin contained in Section 5(b) of the 1946 Act referred only to lump sum insurance—to one only of the kinds of insurance named in Subsection (t), added by the 1946 Act to Section 602 of the 1940 Act.

The Supreme Court has stated:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as Bacon's Abridgement, Section 2, it was said that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous or insignificant.' "
>
> *Ex Parte Pub. Nat. Bank,* 278 U. S. 101, 104, 73 L. ed. 202, 48 S. Ct. 43.

We ask the application of that rule in considering Section 5(b) of the 1946 Act.

At the beginning of the annotated code sections with which we are concerned, to-wit, Sections 801 and following of Title 38, there is a reference to "United States Code Service, Page 1394."

In the introduction to the book last mentioned, there is a statement as to the value, in construing federal Acts, of the reports of the congressional committees. Page 1394 of the volume identifies Senate Report 1705 (July 12, 1946) as being the Senate Finance Committee Report on the proposed 1946 Act. Turning to page 1397 of the volume, we have a statement as to the construction or purpose of Section 5 of the 1946 Act:

> "Section 5 of the committee amendment further provides that sub-sections 602(i), (j) and (k) of the National Life Insurance Act of 1940 be amended by adding at the end of each subsection the following:
>
> > 'The provisions of this sub-section shall not be applicable to insurance maturing on or after the date of the Insurance Act of 1946.'
>
> The provisions of the sub-section in question relate to the payment of insurance benefits which are limited to a restricted permitted class of beneficiaries and such provisions would not be in conformity with the disposition of insurance, payment of which is not limited to a restricted permitted class of beneficiaries."

The last reference was, of course, to what became Section 4 of the 1946 Act. Note that "Section 5" referred to in the quotation became Section 5(b).

Note that the report was dated July 12, 1946. It shows what finally went into the Act of August 1, 1946, 19 days later. On the first page of the report it is said:

> "The amendment proposed by the committee is a complete substitute for the bill as referred to the committee."

It is to be noted that in writing up the bill, what was added to subsections (i), (j) and (k) was all shown in one section—Section 5(b). When the two laws were codified and placed in Title 38, Section 801 and following, the prohibition was repeated under subsections (i), (j) and (k).

What we have here is a specific provision in subdivision (u), which governs a stated fact or set of facts not actually presented in this case, but we have also section 5(b), a general provision and a state of facts to which the principle of Section 5(b) can apply, to-wit: the claims of contingent beneficiaries. The following principle is to be noted:

> "Where the statute establishes a general rule and certain exceptions thereto, the court will not by *implication* add any more exceptions *and will not add exceptions merely because good reason exists therefor.*" (Italics ours.)
>
> 59 *Corpus Juris,* p. 974.

Note also the following:

> "Sec. 367. General and Specific Provisions.—It is an old and familiar principle, closely related to the rule that where an act contains special provisions they must be read as exceptions to a

general provision in a separate earlier or subsequent act, that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision."

50 *Am. Jur.*, Sec. 367, p. 371.

We refer again to a general rule, which is well established.

"According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. Pease v. Whitney, 5 Mass. 380; Nichols v. Bertram, 3 Pick. 342; State v. Perrysburg, 14 Ohio St. 472; London etc. Railway v. Wandsworth Board of Works, L. R. 8 C. P., 185; Bishop on the Written Laws, sec. 112a. The deed of the mayor to Townsend having been executed in conformity with the special Act, was, therefore, valid and effectual to convey the legal title."

Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 S. Ct. 357.

Of course, the executive departments may enact regulations, but they

> "* * * must be reasonable and consistent with the law, in order to be valid."
>
> 54 *Am. Jur.*, Sec. 41, p. 557.

Judge Murphy's opinion shows this.

We repeat Section 5(b):

> "5(b). Subsections (i), (j) and (k) of Section 602 of the National Service Life Insurance Act of 1940, as amended, are amended by adding at the end of each of such subsections the following: 'The provisions of this subsection shall not be applicable to insurance maturing on or after the date of enactment of the Insurance Act of 1946.' "

The language so qualified is language of the 1940 Act, which Act dealt with installment insurance only and which, after August 1, 1946, was to continue to apply to the existing matured installment insurance of the 1940 Act until it was all paid out.

It is hardly in order to even refer to said Subsections (i) and (j) without referring also to the havoc they produced in the *Henning* case. We quote them.

> "(i) * * * The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h)."
>
> "(j) No installments of such insurance shall be paid to the heirs or legal representatives as

> such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."

Act of 1940.

(Subsection (k) is referred to in Section 5(b) along with Subsections (i) and (j), but the reference is immaterial here.)

Can it be argued that the intention of Section 5(b) of the 1946 Act was to have words of such origin apply only to lump sum insurance of the 1946 Act? Section 5(b) plainly refers to any insurance maturing after the enactment of the 1946 Act and that insurance could certainly be payable in one sum or in installments. The language says (i), (j) and (k) "are amended". How? The wording is explicit. If we can imply a permissible selecting of contingent beneficiaries of installment insurance, we cannot hold that Section 5(b) has no application to the additional rights attempted to be implied here for the benefit of contingent beneficiaries. Their taking destroys the plan of taking specified in Subsection (u) of Section 602; destroys the sending of the uncollected accrued insurance to the only recipient named in the subsection.

We have contradiction here, but Courts reduce contradiction into the narrowest limits possible. They do not imply conditions in order to widen the scope of what is special and reduce the scope of what is general. The Courts avoid harsh results in construing a law if that is possible and it is harsh to hold that

the right to insurance awarded to a beneficiary depends on a footrace with death in getting to a paying teller's window. Death won the race in the *Henning* case. The Court referred to "three deaths" and "seven years" of litigation. The Senate Finance Committee Report threw out the whole group of selected beneficiaries of the 1940 law, if the insurance matured on or after August 1, 1946. The law had harsh results in cutting out the rights of estates of deceased beneficiaries—caused it by mere delay in determining rights. Congress knew this. And we urge that we have no right to say that it shall be implied that the estate of a primary beneficiary shall have no right here because we have before us the demand of two contingent beneficiaries.

The government's brief objects to "filtering down" of benefits to creditors or unknown heirs. That is the priority ladder argument of the *Henning* case and the *Baumet* case, a companion case. The *Henning* case dealt with a wartime measure. The 1946 law is not such a measure and there is no "ladder of priority" in the 1946 law and such was, in effect, the statement of the Senate Finance Committee herein referred to.

The *Henning* case states:

> "No peacetime amendments, as those which in 1919 and 1924 specifically altered the deliberate wartime result can aid the contention presented today."
>
> *U. S. v. Henning,* 344 U.S. 66, 97 L. ed. 101, 73 S. Ct. 114.

Of course, the particular rule applied in Subsection (u) is at partial variance with what was laid

down in Subsections (i), (j) and (k) of Section 602 of the 1940 Act, but that does not mean that Section 5(b) was purposeless, so far as installment insurance was concerned, that it did not negative the argument that if the veteran's policy matured on August 1, 1946, installments matured and uncollected at the death of the first beneficiary would go to a contingent beneficiary. The fact is that the 1940 Act permitted contingent beneficiaries. They could be named within a statutory preferred list and if not so named, the statute named the substitute. *The Henning case shows that by express provision of the 1940 Act, the secondary choice got all installments that were uncollected at the primary beneficiary's death.* So neither Henning's father or his estate nor the true mother of Henning or her estate got anything, because they died while litigation hung up payment.

We repeat and respectfully urge that Subsection (u) simply does not cover a case like this one and that Section 5(b) clearly fits the situation which arises when a beneficiary dies who has failed to collect installment insurance and a contingent beneficiary sets up the claim that the amounts are his. It is at this junction that Section 5(b) can and does apply.

Dated, Berkeley, California,
June 20, 1955.

Respectfully submitted,
George Clark,
Clark & Morton,
Attorneys for Appellee.

No. 14669

United States Court of Appeals for the Ninth Circuit

LOUIS FLEISH,

Appellant,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

APR 18 1955

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

No. 14669

United States Court of Appeals

for the Ninth Circuit

LOUIS FLEISH,

Appellant,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Amended Order Dismissing Petition for the Writ of Habeas Corpus.................... 10

Certificate of Clerk to Record on Appeal...... 13

Motion in Letter Form to Set Aside Order Dismissing Petition 9

Names and Addresses of Attorneys........... 1

Notice of Appeal.............................. 11

Order Dismissing Petition for the Writ of Habeas Corpus 8

Petition for Writ of Habeas Corpus.......... 3

Points Relied On for Appeal................ 13

Praecipe Transcript of Record............... 12

NAMES AND ADDRESSES OF ATTORNEYS

LOUIS FLEISH, Pro Per,
Box 574,
Alcatraz, California.

LLOYD H. BURKE,
United States Attorney;

RICHARD H. FOSTER,
Assst. U. S. Attorney,
P. O. Bldg.,
San Francisco, California.

Attorneys for Respondent and Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 34219

LOUIS FLEISH,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To: The Honarable Court.

Comes now Louis Fleish, petitioner herein, who claims to be held in unlawful restraint of his liberty, by E. B. Swope, Warden at the United States Penitentiary, Alcatraz, California, under color of authority of the United States, in violation of the Constitution, and laws of the United States, relying upon the reasons and facts as follows:

Jurisdictional Statement

1. This Court has jurisdiction under 28 U.S.C. 2241, et cetera.

Statement of Facts

2. On April 7, 1949, in the United States District Court at Detroit, Michigan, petitioner was found guilty of six (6) counts of a 27 count indictment charging violations of Title 26 U.S.C.A. 1132-1132q, 1934 Edition; that the Court imposed

5 years as to counts 1, 3, 12, 15, 18 and 21, to be served consecutively for a total of 30 years.

Allegation of Section 2255

3. The petitioner filed a Motion in the trial court under Section 2255 on July .., 1949, attacking the validity of the sentence by claiming that there was only one punishable offense and that the petitioner was only required to serve 5 years; that the Motion was overruled on September 16, 1949; that the United States Court of Appeals for the Sixth Circuit affirmed the judgment, and is reported at U. S. v. Fleish, et al., No. 24766; that Section 2255 has proven inadequate to test the legality of the judgment and sentence; that this Court has jurisdiction to entertain the writ, relying upon the following case: Wells v. Swope, No. 33471 (1954) Northern District of California, Southern Division.

4. That the judgment order reads as follows:

Count 1, Five (5) years;
Count 3, Five (5) years;
Count 12, Five (5) years;
Count 15, Five (5) years;
Count 18, Five (5) years; and under count 21, Five (5) years, said terms of imprisonment to run consecutively.

5. That the petitioner claims to be held in excess of the maximum authorized by law, by reason of the following facts:

I.

That the Judgment order fails to definitely

specify the order of sequence as to the execution of the several sentences; therefore, petitioner cannot be held in excess of the first 5 year sentence.

II.

That the mere designation in the Judgment order that the sentences are to be served consecutively (and not concurrently) for an aggregated term of 30 years does not clearly designate the sequence in which the sentences are to be served and the petitioner may avail himself of the writ.

III.

That the petitioner is entitled to immediate discharge because the judgment order fails to definitely designate the exact day when each sentence would become effective; that for the order to imply that the sentences are to be served consecutively to "Each Other" is vague and indefinite.

Cases Relied on

Mills v. Hunter,
204 F. 2d 468;

McNealy v. Johnston,
100 F. 2d 280;

United States v. Remis,
12 F. 2d 239;

Ziebart v. Hunter,
177 F. 2d 982;

Levine v. Hudspeth,
127 F. 2d 982;

Chasteen v. Denemark,
7 C.A.A., Nov. 1943;

People ex rel. Clancy v. Graydon,
160 NE 748;

United States v. Patterson,
29 F. 2d 775;

Howard v. United States,
75 F. 2d 986; 18 USC 3568.

6. That petitioner concedes that the court could impose consecutive sentences,

United States v. Solomon,
70 F. 2d 834;

Miketich v. United States,
72 F. 2d 550; 18 USC 3568.

6A. However, the Court is required to definitely specify the order of sequence as well as the precise day the sentences become effective, as to each other.

Relief Requested

The petitioner does not request to be present at the hearing because the records are all that are required. The petitioner respectfully requests that a prompt hearing be held and that the facts and law be determined solely by the records. The petitioner finally requests that he be discharged at once.

Respectfully submitted,

/s/ LOUIS FLEISH,
Petitioner in Propria Persona.

Dated: Nov. 1st, 1954.

Verification

State of California,
County of San Francisco—ss.

I, Louis Fleish, petitioner herein, hereby swear on oath that all I state herein above is true as to my knowledge and belief; that this 1st day of Nov., 1954, a copy of the above petition was mailed to: the United States Attorney, of the above court.

/s/ LOUIS FLEISH,
Affiant-Petitioner.

Subscribed and sworn to before me this 1st day of November, 1954.

[Seal] /s/ M. R. BERGEN,
Associate Warden.

Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed November 17, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 34219

LOUIS FLEISH,

Petitioner,

vs.

E. W. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER DISMISSING PETITION FOR THE WRIT OF HABEAS CORPUS

Petitioner, who has served some 15 years of a 30-year sentence consisting of six consecutive five-year terms, now seeks his release on the ground that the only valid portion of the sentence was the first five-year term. The remainder of the 30-year sentence is asserted to be void for uncertainty because the trial court, the United States District Court for the Eastern District of Michigan, in imposing the sentence upon six counts of an indictment, failed to specify the sequence in which the five-year terms should follow one another, and to designate the day upon which each term would begin to run.

Petitioner contends that this Court has jurisdiction to entertain this petition for a writ of habeas corpus because his motion to vacate the sentence, previously addressed to the trial court pursuant to 28 USC 2255, has proved ineffective to

test the legality of his detention. The motion to vacate was filed in the trial court in 1949, and denied 90 F. Supp. 273. The judgment denying the motion was affirmed on appeal. 181 F. 2d 1009. It appears both from the reports of the opinions of the trial and appellate courts upon the motion to vacate and from the present petition that the ground of the motion was that the six counts upon which petitioner was sentenced described only two offenses.

Thus the merits of the contention which petitioner makes in this petition has never been tested by way of motion pursuant to 28 USC 2255. This court is therefore without jurisdiction to entertain the petition, and it must be and is hereby dismissed.

Dated: December 11, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 14, 1954.

From: Louis Fleish,
Box No. 574.

Dec. 19, 1954.

Re: 34219 (Civil)

Hon. Louis E. Goodman, Judge,
U. S. District Court,
San Francisco 1, Calif.

Your Honor:

Please set aside your order of Dec. 14, 1954, because:

1. "A prisoner may be heard in habeas corpus to contend that he is being held in confinement after having fully served the sentence for which he was committed and 28 U.S.C. 2255, does not take away the right to urge such a question in habeas corpus."

(204 F. 2d at 470.)
Butterfield vs. Wilkinson,
(1954) 212 [215] F. 2d 320, (9 Cir.); 14035.

Brown vs. Hunter,
187 F. 2d 543, (10 Cir.)

Therefore, because the allegation in the petition is valid and because it now appears that I do "not" have to use 28 U.S.C. 2255, I respectfully request you to set aside your order of Dec. 14, 1954, and issue an order for my immediate release.

Truly yours,

/s/ LOUIS FLEISH,
Box No. 574,
Alcatraz, Calif.

[Title of District Court and Cause.]

AMENDED ORDER DISMISSING PETITION FOR THE WRIT OF HABEAS CORPUS

Petitioner seeks a rehearing of his petition for the writ of habeas corpus which was dismissed by an order of December 11, 1954. The order of dis-

missal was made on the ground that petitioner's proper remedy was a motion addressed to the trial court pursuant to 28 USC 2255, and that therefore this Court was without jurisdiction to entertain the petition. Petitioner urges, however, that habeas corpus is an appropriate remedy, citing Mills v. Hunter, 204 F. 2d 468 (10 Cir. 1953) and Butterfield v. Wilkinson, 215 F. 2d 320 (9 Cir. 1954). I am still of the view that the question tendered by this petition should be presented to the trial court by motion pursuant to 28 USC 2255. However, inasmuch as it can be clearly determined from the face of the petition that the asserted grounds for relief are without merit, it is Ordered that the petition be and hereby is dismissed on the merits, as well as for lack of jurisdiction.

Dated: December 21, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name: Louis Fleish. Address: Box No. 574. City: Alcatraz. State: California. Violation of Sections: 1132e-1132d, Title 26 U.S.C.A., United States Code; Sentence of 30 years; A petition for Writ of Habeas Corpus was denied on the 14th day of

Petition for Writ of Habeas Corpus.

Order Dismissing Petition for the Writ of Habeas Corpus.

Motion in letter form to Set Aside Order Dismissing Petition.

Amended Order Dismissing Petition for the Writ of Habeas Corpus.

Notice of Appeal With Praecipe Transcript of Record and Points Relied On for Appeal attached.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of February, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14669. United States Court of Appeals for the Ninth Circuit. Louis Feish, Appellant, vs. E. B. Swope, Warden, U. S. Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14,669

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS FLEISH,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILED
JUL 21 1955
PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Question presented	3
Argument	3

Table of Authorities Cited

Cases

	Page
Butterfield v. Wilkinson (9th Cir.), 215 F.2d 320	2
Lipscomb v. Madigan, No. 14,730	3
McKee v. Johnson (9th Cir.), 109 F.2d 273	4
Mixon v. Paul (4th Cir.), 175 F.2d 441	4
Phillips v. United States (8th Cir.), 184 F.2d 573	4
United States v. Daugherty, 269 U.S. 360	3
Van Gorder v. Johnson (9th Cir.), 82 F.2d 729	4
Yelvington v. United States (10th Cir.), 178 F.2d 915	4

Statutes

United States Code, Title 28:

Section 2241	1
Section 2253	1
Section 2255	2

No. 14,669

IN THE

United States Court of Appeals
For the Ninth Circuit

LOUIS FLEISH, *Appellant*, vs. E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California, *Appellee*.	

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction under Sections 2241 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

This is an appeal from an order dismissing a petition for a writ of habeas corpus made and entered on December 11 and December 22, 1954 by United States District Judge Louis E. Goodman (Tr. 9, 11).

On November 1, 1954 appellant petitioned for a writ of habeas corpus (Tr. 6). On December 11,

1954 Judge Goodman dismissed this petition on the ground that appellant's proper relief was under Section 2255 (Tr. 8, 9). On December 22, 1954 Judge Goodman amended this order, citing *Butterfield v. Wilkinson,* 215 F. 2d 320 (9th Cir.), and dismissed the petition on the merits (Tr. 11).

Appellant claimed appellee had held him in excess of the maximum term imposed by the sentencing court. The basis of this claim is appellant's contention that the six sentences imposed on the six counts of the indictment under which he was sentenced should be interpreted to run concurrently (Tr. 4-6). Appellant has alleged in his petition that the judgment order of the United States District Court for the Eastern District of Michigan reads as follows (Tr. 4):

> "That the judgment order reads as follows:
>
> Count 1, Five (5) years;
>
> Count 3, Five (5) years;
>
> Count 12, Five (5) years;
>
> Count 15, Five (5) years;
>
> Count 18, Five (5) years; and under count 21, Five (5) years, said terms of imprisonment to run consecutively."

Appellant has served fifteen years of a thirty year term imposed by the United States District Court for the Eastern District of Michigan upon the six counts of the indictment (Tr. 8).

Appeal was timely made to this Court (Tr. 12).

QUESTION PRESENTED.

Need a court specify the order of sequence of consecutive sentences imposed on consecutively numbered counts in a single indictment?

ARGUMENT.

Appellant argues that the sentences imposed under the six counts of the indictment should be interpreted to run concurrently despite the court's direction that they were to run consecutively because the judgment order did not designate the exact day when each sentence would become effective (Tr. 5; Appellant's brief, page 4).

A similar contention was made in the case of *Lipscomb v. Madigan,* No. 14,730, in the Court of Appeals for the Ninth Circuit decided June 27, 1955. There, as here, the judgment order did not expressly specify the order of sequence in which the sentences should be served. This Court held, citing *United States v. Daugherty,* 269 U.S. 360, that the judgment was sufficient to impose consecutive sentences "to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment."

The *Daugherty* case, supra, is identical with the one at bar. There, as here, the prisoner was convicted on a number of counts in the same indictment

and received consecutive sentences therefor. The court did not specify in what sequence the sentences should be served. The Supreme Court, however, declared that the "reasonable and natural implication" from the judgment was that the sentences were "to follow each other in the same sequence as the counts appeared in the indictment." The court went on to say that while "sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded."

In the case of *Mixon v. Paul* (4th Cir.), 175 F. 2d 441, where there were two counts in a single indictment and the court ordered that the sentences be consecutive, the court held that the sentences should be served in numerical sequence. In *Yelvington v. United States* (10th Cir.), 178 F. 2d 915, where there was no specification of the order of consecutive sentences, the court held that they should be served in numerical sequence. See also *Phillips v. United States* (8th Cir.), 184 F. 2d 573; *McKee v. Johnson* (9th Cir.), 109 F. 2d 273. This Court has also ruled adversely to appellant's contention in *Van Gorder v. Johnson* (9th Cir.), 82 F. 2d 729.

There is no doubt as to the intention of the sentencing court in this case. The court intended that appellant's sentences be consecutive. The order in which these sentences should be served is obviously

the order in which they appear and are numbered in the judgment. The judgment of the court below should be affirmed.

Dated, San Francisco, California,
July 20, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14670

United States Court of Appeals
for the Ninth Circuit

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and E. D. MOODY,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

APR 18 1955

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-11-55

PAUL P. O'BRIEN, CLERK

No. 14670

United States Court of Appeals

for the Ninth Circuit

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and E. D. MOODY,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-11-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 30

Certificate of Clerk to Record on Appeal...... 39

Judgment 36

Names and Addresses of Attorneys........... 1

Notice of Appeal........................ 37

Notice of Motion for Summary Judgment, Defendants', Filed January 11, 1954.......... 17

Affidavit of Eyler, H. E................. 18

Ex. B—Letter Dated December 2, 1949 23

C—Letter Dated December 3, 1949 23

D—Letter Dated December 3, 1949 24

E—Letter Dated December 8, 1949 24

F—Letter Dated April 19, 1950... 25

G—Letter Dated May 22, 1950.... 26

H—Letter Dated May 24, 1950.... 27

I—Letter Dated September 5, 1950 28

Notice of Motion for Summary Judgment, Defendants', Filed December 29, 1954.......... 35

Order Denying Motion for Summary Judgment 29

Petition for Removal........................ 3

Ex. A—File From Case No. 434174 in the Superior Court of the State of California and for the City and County of San Francisco......... 8

Statement of Points........................ 42

Undertaking on Appeal Costs Only........... 37

NAMES AND ADDRESSES OF ATTORNEYS

THOMAS C. PERKINS, ESQ.,
801-9th St.,
Sacramento, Calif.,

Attorney for Plaintiff and Appellant.

BURTON MASON, ESQ.,
W. A. GREGORY, ESQ.,
65 Market St.,
San Francisco 5, Calif.,

Attorneys for Defendants and Appellees.

In the United States District Court for the Northern District of California, Southern Division

No. 33262

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants.

PETITION OF SOUTHERN PACIFIC COMPANY FOR REMOVAL OF CIVIL ACTION FROM STATE COURT TO UNITED STATES DISTRICT COURT

To the Honorable, the United States District Court for the Northern District of California, Southern Division:

Your petitioner, Southern Pacific Company, a corporation, petitioning to remove a civil action brought in the State Court to the United States District Court for the Northern District of California, Southern Division, respectfully shows:

I.

Heretofore, and on the 22nd day of December, 1953, a civil action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco. Said action was and is entitled and numbered in said Court and on the files of the Clerk of said Court as appears on

the copy of the complaint served on petitioner, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein as though set forth in full. Petitioner and E. D. Moody are named in said action as the sole defendants. The nature of the action appears from said copy of said complaint hereto attached. Process in said action was first served on your petitioner on December 22, 1953. Attached hereto and herein incorporated as such are copies of all process, pleadings and orders served upon petitioner, namely, "Exhibit A." This petition is accompanied by a bond with good and sufficient surety conditioned that your petitioner, defendant in said action, will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

II.

Your petitioner, Southern Pacific Company, at all times mentioned in the complaint in said action was, and it now is, a corporation duly created, organized and existing under and by virtue of laws of the State of Delaware, and of no other State, and was at all of said times a citizen and resident of the State of Delaware.

III.

The plaintiff was at the time of the commencement of said action, ever since has been, and is now a citizen and resident of the State of California, and at none of said times was he a citizen or resident of the State of Delaware.

IV.

The above-entitled suit and action at all times was and is of a civil nature at law, over which the District Courts of the United States are given jurisdiction, brought for the recovery of $20,000 damages and an unstated amount of additional damages in the nature of wage loss, all claimed to have been caused by the alleged wrongful discharge of plaintiff on September 5, 1950, from his employment by the defendant as a brakeman. Petitioner wholly contests and denies said claim of the complaint. The amount in controversy in said suit and action exceeds, exclusive of interest and costs, the sum and value of $3,000, being of the sum and value of $20,000, plus the unstated amount of wage loss referred to in the aforementioned complaint.

V.

For reasons which appear hereafter, this action is properly one wholly between citizens and residents of different states, to wit, between plaintiff, a citizen and resident of the State of California, and defendant, Southern Pacific Company, a corporation, a citizen and resident of the State of Delaware. Defendant E. D. Moody is presently Assistant General Manager of defendant Southern Pacific Company and is a citizen and resident of the State of California. Nevertheless, this action is properly removable because (1) no cause of action is stated against defendant E. D. Moody and plaintiff's failure to state a cause of action is obvious according to

the settled rules of the State of California; (2) the intended claim involves a separable controversy; and (3) defendant E. D. Moody was improperly and fraudulently joined herein as a defendant for the sole purpose of preventing removal of this cause, all of which is more fully stated hereinafter.

VI.

The complaint states no cause of action against the defendant E. D. Moody, there being no connection shown between E. D. Moody and plaintiff's alleged wrongful discharge. Nor does it appear that E. D. Moody was a party to the written agreement which is set forth in paragraph IV of the complaint as being the basis of the intended cause of action or that E. D. Moody could possibly have been liable for a breach of the said agreement.

VII.

There is in the above suit a separable controversy which is wholly between plaintiff and the petitioner which can be fully determined as between them without the presence of petitioner's co-defendant, E. D. Moody, and even if it were assumed that the acts had been alleged to have been done jointly by petitioner and its co-defendant they would have been, if done at all, done by petitioner alone, and its co-defendant did not at any time material to the complaint possess, control or use the authority or jurisdiction over the employment or dismissal of plaintiff or the prior or subsequent handling thereof; nor is the said co-defendant alleged to be a

party to the written agreement upon which the complaint is based.

VIII.

By reason of the facts set forth in paragraph VII above, which the said plaintiff well knew at the time of bringing this suit, the defendant E. D. Moody is improperly and fraudulently joined herein as a defendant for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause as prayed for herein, and for no other purpose.

IX.

Petitioner has not appeared in said action and petitioner is not required by the laws of California, or by the laws of the United States of America, or by any rule of the Court in which said action was commenced, or otherwise, to answer or plead to aid complaint prior to January 2, 1954.

X.

Petitioner shows that by reason of the premises and the aforesaid facts it desires, and is entitled, to have said suit and action removed from the Superior Court of the State of California in and for the City and County of San Francisco, into the United States District Court for the Northern District of California, Southern Division.

Wherefore, petitioner prays that this action be removed from said State Court into the United States District Court for the Northern District of California, Southern Division, and that no other

or further proceedings be had in this suit in said State Court, and for such other, further and different relief as, the premises considered, is proper.

BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

Duly verified.

EXHIBIT A

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 434174

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants.

COMPLAINT

Plaintiff complains of defendants, and for cause of action alleges:

I.

That at all times herein mentioned defendant Southern Pacific Company was a corporation, incorporated and existing under the laws of the State of Delaware, and at all times herein mentioned was doing business in the State of California.

II.

That E. D. Moody is the Assistant General Manager of the defendant Southern Pacific Company, and at all times herein mentioned was acting as the agent of the defendant Southern Pacific Company and within the scope and course of his employment.

III.

That on September 5, 1950, and for a long time prior to said time, plaintiff was employed as a brakeman by the defendant Southern Pacific Company.

IV.

That at all times herein mentioned a written agreement existed between the defendant Southern Pacific Company and the Brotherhood of Railroad Trainmen, said agreement covering the terms of employment between plaintiff and defendant Southern Pacific Company.

V.

That pursuant to the terms of said agreement plaintiff was not to be discharged except for just cause, and not to be discharged without a fair and impartial investigation.

VI.

That on November 30, 1949, plaintiff was unjustly accused of having been intoxicated while on duty.

VII.

That plaintiff on September 5, 1950, was discharged without said fair and impartial hearing

having been held, and that said discharge was wrongful and without just cause.

VIII.

That plaintiff was denied his wages from November 30, 1949, and continues to be denied his wages; that plaintiff is informed and believes, and therefore alleges, that he will continue to be denied his wages for an indefinite period of time in the future. That the amount of said wages is at this time unascertainable, and plaintiff asks leave of court to insert the amount of.............. herein as the loss of wages when said loss of wages is ascertained, all to plaintiff's damage in the amount of............ for loss of wages.

IX.

That plaintiff has been deprived of seniority benefits, pension benefits, hospital benefits, as a result of such wrongful discharge, and that his damage for the loss of such benefits amounts to $20,000.00.

Wherefore, plaintiff prays for judgment against the defendants in the amount of $20,000.00, for loss of his seniority benefits, pension benefits, and hospital benefits; and for the sum of................. for damages for such loss of wages as will be hereafter ascertained; and for his costs of suit; and for such other and further relief as may seem meet and proper.

THOMAS C. PERKINS,
Attorney for Plaintiff.

State of California,
County of Sacramento—ss.

Thomas C. Perkins, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above-entitled action; that said plaintiff resides outside the county in which said attorney maintains his office; that he has read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein states on information and belief, and as to those matters he believes it to be true.

THOMAS C. PERKINS.

Subscribed and sworn to before me this...day of December, 1953.

LORRAINE A. LARKIN,
Notary Public in and for the County of Sacramento, State of California.

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 434174

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants.

SUMMONS—GENERAL

Action brought in the Superior Court of the State of California in and for the City and County of San Francisco, and the complaint filed in the office of the County Clerk of said City and County.

The People of the State of California Send Greeting to: Southern Pacific Company, a Corporation, and E. D. Moody, Defendants.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages

demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated: Dec. 22, 1953.

[Seal] MARTIN MONGAN,
Clerk;

By J. KEEGAN,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF FILING OF PETITION AND BOND FOR REMOVAL FROM STATE COURT TO FEDERAL COURT

To the Superior Court of the State of California in and for the City and County of San Francisco, and to the Plaintiff Above Named and to His Attorney, Thomas C. Perkins, Esq.:

You are hereby notified that defendant, Southern Pacific Company, has made and filed on December 31, 1953, in the United States District Court for the Northern District of California, Southern Division, its Petition and Bond for removal of the above-entitled action from the Superior Court of the State of California in and for the City and County of San Francisco to the United States District Court in and

for the Northern District of California, Southern Division; that copies of said Petition and Bond are hereto attached and made a part hereof.

Dated: December 31, 1953.

BURTON MASON,

W. A. GREGORY,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 31, 1953.

[Title of District Court and Cause.]

BOND FOR REMOVAL

Know All Men by These Presents:

That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State, as Surety, is held and firmly bound unto Norman Breeland, plaintiff in the above-entitled action, in the penal sum of Five Hundred Dollars ($500.00), for the payment of which sum well and truly to be made unto said plaintiff, his heirs, executors, administrators, successors or assigns, the undersigned Indemnity Insurance Company of North America binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with the seal of said company and dated at the City and County of San Francisco, State of California, this 31st day of December, 1953.

Whereas, the above-entitled action, wherein Norman Breeland is plaintiff and Southern Pacific Company, a corporation, and E. D. Moody are defendants, has been brought and is pending in the Superior Court of the State of California, in and for the City and County of San Francisco, and bears docket number 434174; and

Whereas, Southern Pacific Company, defendant in said action, has petitioned or is about to petition the above-named United States District Court for the Northern District of California, Southern Division, for the removal to said United States District Court of said cause of action;

Now, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that said case was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

The said Indemnity Insurance Company of North America hereby expressly agrees that in case of a breach of any condition hereof the said District Court may, upon notice to it of not less than ten (10) days, proceed summarily in the action, suit, case or proceeding in which this bond is given to ascertain the amount which said surety is bound to

pay on account of such breach, and render judgment therefor against it, and award execution therefor.

Witness the signature and seal of the undersigned the day and year first above written.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

By /s/ GEORGE F. HAGG,
Its Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 31st day of December in the year one thousand nine hundred and fifty-three, before me, Alice Browne, a Notary Public in and for the City and County of San Francisco, personally appeared George F. Hagg, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ ALICE BROWNE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 28, 1956.

[Endorsed]: Filed December 31, 1953.

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Above-Named Plaintiff, and to His Attorney, Thomas C. Perkins, Esq.:

You, and each of you, are hereby notified that on Monday, the 15th day of February, 1954, at the Courtroom of the above-entitled Court, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named defendants will present to the Court their motion for the entry of summary judgment in their favor in this cause.

Said motion for summary judgment will be based upon the provisions of Rule 56 of the Federal Rules of Procedure; upon all the papers, files and pleadings in this action; upon the affidavit of Mr. H. E. Eyler, a copy of which is attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in defendants' Memorandum of Points and Authorities in support of said motion, a copy of which is likewise attached hereto and herewith served upon you.

Dated at San Francisco, California, this 11th day of January, 1954.

BURTON MASON,

/s/ W. A. GREGORY,
Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF H. E. EYLER

State of California,
City and County of San Francisco—ss.

H. E. Eyler, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in Alameda County, California. My office headquarters are at 65 Market Street, San Francisco, California.

I have been employed by Southern Pacific Company in various capacities for more than thirty years. My present position is Special Assistant, Operating Department, Office of the Vice President and General Manager, Southern Pacific Company. Since April 1, 1942, my duties have consisted primarily of handling labor relations for Southern Pacific Company, particularly with respect to discipline and grievances. Thus I have been directly concerned with the interpretation and application of the discipline and grievance provisions of the agreement between Southern Pacific Company (Pacific Lines) and the General Committee, Brotherhood of Railroad Trainmen, covering rates of pay and rules for trainmen employed on the Pacific Lines, Southern Pacific Company, dated December 1, 1939, effective December 16, 1939 (hereinafter referred to as "Agreement"), which were stated in the complaint to be applicable to the employment of plaintiff. A copy of this Agreement is attached as Exhibit "A" to this affidavit and is hereby referred to.

I make this affidavit for use in connection with the motion for summary judgment filed by defendants in the above-entitled action, and for any and all other purposes in connection with said action.

I have obtained all of the records covering the employment of plaintiff, who was formerly employed by the Company as a brakeman (synonymous with trainman) on the Sacramento and San Joaquin Divisions of Southern Pacific Company. These records indicate the following: That Norman Breeland, the plaintiff herein, was employed by Southern Pacific Company on November 3, 1942, and was dismissed for violation of Rule "G" of the Rules and Regulations of the Transportation Department by letter of B. W. Mitchell, Superintendent, San Joaquin Division, dated December 2, 1949. A copy of the said letter of December 2, 1949, is attached as Exhibit "B" to this affidavit and is hereby referred to. Subsequent to December 2, 1949, certain correspondence passed between plaintiff, and his representatives, and Southern Pacific Company. Exhibit "C" to this affidavit hereby referred to is photostatic copy of letter from Mr. H. D. Heard, Local Chairman, Brotherhood of Railroad Trainmen, to Mr. B. W. Mitchell, Superintendent, Southern Pacific Company, Bakersfield, California, dated December 3, 1949. Exhibit "D" to this affidavit hereby referred to is photostatic copy of letter from Norman Breeland, the plaintiff, addressed to Mr. B. W. Mitchell, dated December 3, 1949. Exhibit "E" to this affidavit hereby referred to is copy of letter from Mr. B. W. Mitchell to Mr. H. D.

Heard, dated December 8, 1949. Exhibit "F" to this affidavit hereby referred to is photostatic copy of letter from Mr. Glenn R. Bennett, Local Chairman, Brotherhood of Railroad Trainmen, addressed to Mr. B. W. Mitchell, dated April 19, 1950. Exhibit "G" to this affidavit hereby referred to is photostatic copy of letter from Mr. Glenn R. Bennett to Mr. B. W. Mitchell, dated May 22, 1950. Exhibit "H" to this affidavit hereby referred to is photostatic copy of letter from Mr. J. J. Corcoran to Mr. H. R. Hughes, dated May 24, 1950. Exhibit "I" to this affidavit hereby referred to is copy of letter from Mr. H. R. Hughes to Mr. J. J. Corcoran, dated September 5, 1950.

The agreement included at all times material to this case Article 58, "Limitation in Presenting Grievances," which sets forth certain provisions relating to the handling of grievances involving the dismissal or discipline of an employee. This article provides that in the event a disciplined or dismissed employee is dissatisfied with such discipline, he must present a written grievance covering the claim to the officer named in the article within the time limitation provided therein. Article 58, Section (c), Item 6, reads as follows:

"Item 6: The following provisions of Section 4(c), Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

> " 'Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of

said officer's decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified. It is understood, however, that the parties may by agreement in any particular case extend the one-year period herein referred to.'

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer's decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified, subject to extension by mutual agreement."

On August 11, 1950, this case was discussed in conference as provided in Item 5 of Article 58. Thereafter on September 5, 1950, Mr. H. R. Hughes, then Assistant General Manager, Southern Pacific Company, designated as the highest officer to handle disputes falling within the purview of Article 58, addressed Mr. J. J. Corcoran, General Chairman, Brotherhood of Railroad Trainmen, setting forth his decision denying the request as provided in said Article 58, Item 6. On September 6, 1950, Mr. J. J. Corcoran addressed Mr. H. R. Hughes, stating that the case would be handled further by the General Committee. From and after September 6, 1950, the

files contain no further correspondence between plaintiff, or any representative on his behalf, and Southern Pacific Company, or any representative, agent or employee thereof. On September 22, 1953, the complaint in this action was filed.

The correct and consistently observed application of the above-quoted item of Article 58, "Limitation in Presenting Grievances," is as follows: If proceedings for the final disposition of the dispute either before the National Railroad Adjustment Board or in court are not commenced within one year from the date of the final decision referred to in Item 6 (in this case the decision of Mr. H. R. Hughes dated September 5, 1950; Exhibit "I" hereto), all rights under the Agreement terminate and the cause of action is deemed to have been abandoned. No such proceedings were instituted within the one-year limitation or at any other time until December 22, 1953, the date of the filing of the complaint in this action, which was more than three years next following the said decision.

/s/ H. E. EYLER.

Subscribed and sworn to before me this 11th day of January, 1954.

[Seal] /s/ RUTH W. GEORGE,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 19, 1954.

EXHIBIT B

Bakersfield, December 2, 1949.

Mr. N. Breeland
Brakeman—Tracy

Evidence adduced at formal investigation held at Fresno, which convened 3:20 p.m., November 29, 1949, recessed 5:15 p.m., that date, reconvened 10:05 a.m., November 30th and adjourned 10:40 a.m., that date, established your responsibility for being under the influence of intoxicants while on duty as brakeman, Train 3/423 at Fresno, about 1:45 p.m. November 26, 1949.

Your actions in this instance constituted a violation of Rule "G" of the Rules and Regulations of the Transportation Department.

For reasons stated you are hereby dismissed from the service of the Southern Pacific Company.

B. W. MITCHELL.

EXHIBIT C

123 East 7th St.
Tracy, California

Dec. 3, 1949

Mr. B. W. Mitchell,
Supt. Sou. Pac. Co.,
Bakersfield, Calif.

Dear Sir:

Please send me copy of transcript of investigation which was held at Fresno Nov. 28 and 29, 1949.

whereby Brakeman N. Breeland was dismissed for violation of Rule "G."

Yours very truly,

/s/ H. D. HEARD,
Local Chairman Road Comm.
BRT Lodge 849.

P.S.—Please mail to address at top.

EXHIBIT D

Tracy, Calif.

December 3rd, 1949.

Mr. B. W. Mitchell:

I am in receipt of your letter of December 2nd, 1949, advising me that I am dismissed from the service of the Southern Pacific Co.

/s/ NORMAN BREELAND.

EXHIBIT E

(Copy)

December 8, 1949.

Mr. H. D. Heard
Local Chairman—BRT
123 East 7th Street
Tracy, California

Dear Sir:

As requested in your letter of December 3rd, attached is copy of transcript of testimony taken in formal investigation at Fresno which convened 3:20 p.m. November 29th, recessed 5:15 p.m. that date, reconvened 10:05 a.m., November 30th and ad-

journed 10:40 a.m. that date, with respect to Brakeman N. Breeland being under the influence of intoxicants while on duty as brakeman, train 3/423, Fresno Train Yard, November 26, 1949, which includes testimony of the following:

D. Fitzgerald—Caller (witness).
N. Breeland—Brakeman.
M. A. McIntyre—Trainmaster (witness).
W. F. Stuart—General Yardmaster (witness).
C. A. Owens—Conductor (witness).
W. R. Evans—Engineer (witness).

Yours truly,

Original signed:

B. W. MITCHELL.

Attach ETS

ETS:MMc

EXHIBIT F

Brotherhood of Railroad Trainmen
Snowshed Lodge No. 743

Roseville, Calif.
April 19, 1950

B. W. Mitchell
Superintendent
Southern Pacific Co.
Bakersfield, California

Dear Sir:

In answer to your letter of March 27, 1950, I feel that sufficient time has elapsed since our conference

for you to have made an inquiry as to the conduct of Norman Breeland since his dismissal from service of the Southern Pacific Company.

At the time of our conference I felt you were sincere in your statement that you would investigate this case, and if conditions warranted you would grant Mr. Breeland a personal conference with a recommendation for reinstatement in mind. In the event this cannot be discussed further with you I will appeal this case to the General Committee for further handling.

Awaiting an early reply.

Sincerely,

/s/ GLENN R. BENNETT,
Local Chairman BRT 743

[Stamped]: Received April 20, 1950, S.P.

EXHIBIT G

Brotherhood of Railroad Trainmen
Snowshed Lodge No. 743

Roseville, Calif.
May 22, 1950

B. W. Mitchell
Superintendent
Southern Pacific Co.
Bakersfield, California

Dear Sir:

This will acknowledge receipt of your letter of May 19, 1950, concerning the case of former brakeman Norman Breeland for reinstatement.

Please be advised that this committee cannot accept your decision, therefore, it will be appealed to the General Committee for further handling.

Yours truly,

/s/ GLENN R. BENNETT,
Local Chairman BRT 743.

cc: A. H. Whitmore.

[Stamped]: E.T.S. May 23, 1950. Received May 23, 1950. S.P.

EXHIBIT H

General Committee
Brotherhood of Railroad Trainmen
939 Pacific Building
San Francisco 3, California

May 24, 1950.

Mr. H. R. Hughes
Assistant General Manager
Southern Pacific Company
San Francisco 5, California

Dear Sir:

There has been appealed to this Committee the request of Brakeman N. Breeland, Sacramento Division (working on Stockton District, Western Division), for reinstatement with seniority unimpaired, and claim for compensation for time lost as a result of his dismissal from the service, December 2, 1949, for alleged violation of Rule "G" of the

Rules and Regulations of the Transportation Department at Fresno, November 26, 1949.

Will you please list this case for discussion at a future conference.

Yours very truly,

/s/ J. J. CORCORAN,
General Chairman.

EXHIBIT I

011-181 (B)
September 5, 1950.

Mr. J. J. Corcoran, General Chairman
Brotherhood of Railroad Trainmen
939 Pacific Building
San Francisco 3, California

Dear Sir:

Your letter May 24, 1950, and our conference August 11, 1950, at which time we discussed request for reinstatement of former Brakeman Norman Breeland, Sacramento Division, who was dismissed by the San Joaquin Division on December 2, 1949, for being under the influence of intoxicants while on duty as a brakeman, Train 3/423, Fresno, November 26, 1949:

In conference you stated that you had information from your local chairman that Superintendent Mitchell had no objections to Breeland's reinstatement. Mr. Mitchell advises that he did not tell the local chairman that he had no objections to Bree-

land's reinstatement, but that he would give consideration to his case.

We advised you in conference that Breeland was a Sacramento Division employee at the time of his dismissal and that Superintendent Jennings, who is familiar with his past conduct and service, is unalterably opposed to his reinstatement.

After further consideration of the presentation made by you in Breeland's behalf, we can only conclude that because of the seriousness of the offense for which he was dismissed and his otherwise unsatisfactory record, leniency is not warranted, and your request is denied.

Yours very truly,

H. R. HUGHES.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 11, 1954.

[Title of District Court and Cause.]

ORDER

The defendants' motion for summary judgment having been regularly made and argued before the court, and the court having duly read and considered the affidavits and the motion and the Memorandum of Points and Authorities filed by counsel for both parties and said matter having been argued by both parties on the 1st day of March, 1954, and being fully advised in the premises;

It Is Hereby Ordered that defendants' motion for summary judgment is hereby denied.

Dated March 1, 1954.

/s/ MICHAEL J. ROCHE,
District Judge.

[Endorsed]: Filed March 3, 1954.

[Title of District Court and Cause.]

ANSWER

Southern Pacific Company and E. D. Moody, for answer to the complaint in the above-entitled action, admit, allege and deny as follows:

I.

Admit the allegations of Paragraph I of the complaint.

II.

Answering Paragraph II, admit that E. D. Moody is the Assistant General Manager of the defendant Southern Pacific Company; deny that at any time material to the complaint E. D. Moody was an agent of the defendant Southern Pacific Company possessing, controlling or using any authority or jurisdiction over the employment or dismissal of plaintiff or the prior or subsequent handling thereof; and deny each and every other allegation contained in Paragraph II.

III.

Admit that plaintiff was employed as a brakeman

by the defendant Southern Pacific Company from November 3, 1942, until December 2, 1949, on which date he was dismissed from service for violation of Rule "G" of the Rules and Regulations of the Transportation Department, and deny each and every other allegation contained in Paragraph III.

IV.

Admit that at all times material to the complaint there was in effect a written agreement between defendant Southern Pacific Company and the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939, as amended at various times and in various particulars, covering rates of pay and rules of the class or craft of employees known as trainmen.

V.

Deny each and every allegation contained in Paragraph V.

VI.

Admit that on November 29 and 30, 1949, formal investigation was held, as provided in the agreement referred to in Paragraph IV above, in connection with charges that plaintiff was intoxicated while on duty, and denies each and every other allegation contained in Paragraph VI.

VII.

Deny each and every allegation contained in Paragraph VII.

VIII.

Deny each and every allegation contained in Paragraphs VIII and IX and deny, in particular, that

plaintiff has been damaged or suffered loss of wages in any sum or amount whatsoever.

IX.

Except as specifically admitted herein, defendants deny each and every other allegation contained in the complaint.

First Separate Defense

For a First, Further and Separate Defense to said complaint, defendants allege and show:

I.

The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.

Second Separate Defense

For a Second, Further and Separate Defense to said complaint, defendants allege and show:

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action.

Third Separate Defense

For a Third, Further and Separate Defense to said complaint, defendants further show and allege:

I.

At all times during the aforesaid employment of said plaintiff and continuing to the present time there was and now is also in effect as a part of said agreement of December 16, 1939, as amended in various particulars and at various times, referred to in Paragraph IV hereof the following provisions:

"Article 58.

"Limitation in Presenting Grievances.

"Section (c). Item 1: Any claim of trainmen not submitted in writing within 90 days of the date of the occurrence on which claim is based will be deemed to have been abandoned.

* * *

"Item 6: The following provisions of Section 4(c) Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

> " 'Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer's decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employee or his duly authorized representative and such officer is so notified. It is understood, however, that the parties may by agreement in any particular case extend the one-year period herein referred to.'

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer's decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative and such

officer is so notified, subject to extension by mutual agreement."

II.

That notwithstanding the express provisions of said Article 58 of said agreement of December 16, 1939, plaintiff did not at any time submit or process a claim or grievance in writing or institute or cause to be instituted proceedings for final disposition of the claim based upon dismissal, as required by said Article 58.

III.

By reason of the express provisions of said Article 58, plaintiff's asserted grievance or claim to reinstatement by reason of any such alleged violation by defendants, or either of them, is not entitled to consideration and has wholly ceased to exist.

Wherefore, the defendants Southern Pacific Company, a corporation, and E. D. Moody pray that plaintiff take nothing by his action; that defendants have judgment for their costs of suit incurred herein, and for such other, further and different relief as may be proper in the premises.

BURTON MASON,

/s/ W. A. GREGORY,
Attorneys for Defendants.

Dated: San Francisco, Calif., March 11, 1954.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 11, 1954.

[Title of District Court and Cause.]

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Above-Named Plaintiff, and to His Attorney, Thomas C. Perkins, Esq.:

You, and Each of You, are hereby notified that on Monday, the 10th day of January, 1955, at the Courtroom of the above-entitled Court, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named defendants will present to the Court their motion for the entry of summary judgment in their favor in this cause.

Said motion for summary judgment will be based upon the provisions of Rule 56 of the Federal Rules of Procedure; upon all the papers, files and pleadings in this action; upon the affidavit of Mr. H. E. Eyler, a copy of which is attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in defendants' Memorandum of Points and Authorities in support of said motion, a copy of which is likewise attached hereto and herewith served upon you.

Dated at San Francisco, California, this 28th day of December, 1954.

/s/ BURTON MASON,

/s/ W. A. GREGORY,

Attorneys for Defendants.

[The affidavit and exhibits referred to in the above

are identical to those attached to the Notice of Motion for Summary Judgment filed January 11, 1954.]

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1954.

In the United States District Court, for the Northern District of California, Southern Division

No. 33262

NORMAN BREELAND,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants.

JUDGMENT

Defendants' Motion for Summary Judgment having been regularly made and argued before the Court on January 10, 1954. and the Court having considered the affidavits and the memoranda of points and authorities filed in respect to the motion.

It Is Ordered, Adjudged and Decreed that defendants, Southern Pacific Company and E. D. Moody, do have, and they are hereby granted judgment in their favor and against the plaintiff Norman Breeland, and that said plaintiff, Norman Breeland, take nothing by his complaint.*

Dated: January 13, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

*Barker v. Southern Pacific, 214 F.2d 918 (1954).

See, also Wallace v. Southern Pacific, 106 F. Supp. 742 (N.D. Calif. 1951); Buberl v. Southern Pacific, 94 F. Supp. 11 (N.D. Calif. 1950).

[Endorsed]: Filed January 13, 1955.

Entered January 14, 1955.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given that Norman Breeland, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled court entering summary judgment for defendant in this action on January 14, 1955.

Dated this 20th day of January, 1955.

THOMAS C. PERKINS,
Attorney for Appellant
Norman Breeland.

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL COSTS ONLY

Whereas, in an action in the United States District Court, Southern Division, Northern District of California (Court No. 33262-Civil), judgment was on the 14th day of January, 1955, rendered by the

Judge of said Court in favor of Southern Pacific Co., a Corporation, and E. D. Moody, Defendants, against Norman Breeland, the Plaintiff, for his summary discharge from employment of said Defendant; and whereas, the said Norman Breeland, Plaintiff, is dissatisfied with said judgment and desirous of appealing therefrom to the Ninth United States Circuit Court.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Hartford Accident and Indemnity Company, a Corporation organized and existing under the laws of the State of Connecticut, and duly authorized to transact a general surety business in the State of California, does hereby undertake in the sum of Two Hundred Fifty and No/100 Dollars, and promises on the part of the Appellant, that the said Appellant will pay all costs which may be awarded against Norman Breeland on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty and No/100 Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said surety has caused its corporate name and seal to be attached by its duly authorized Attorney-in-Fact at Sacramento, California, this 27th day of January, 1955.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By /s/ CHARLES F. ELSASSER,
Attorney-in-Fact.

State of California,
County of Sacramento—ss.

On this 27th day of January in the year one thousand nine hundred and fifty-five, before me, A. M. Collins, a Notary Public in and for said County of Sacramento, residing therein, duly commissioned and sworn, personally appeared Charles F. Elsasser, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of Sacramento, the day and year in this certificate first above written.

/s/ A. M. COLLINS,
Notary Public in and for the County of Sacramento, State of California.

My Commission will Expire April 30, 1957.

[Endorsed]: Filed February 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Califor-

nia, do hereby certify that the foregoing documents, listed below, are the originals filed in this court, or true thereof, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition of Southern Pacific Company for removal of civil action from State Court to the United States District Court with documents attached.

Bond for removal.

Defendants' motion for summary judgment with exhibits attached.

Order denying motion for summary judgment filed March 3, 1954.

Answer.

Defendants' motion and notice for summary judgment with exhibits attached.

Judgment.

Notice of appeal.

Designation of contents of record on appeal.

Cost bond on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of February, 1955.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14670. United States Court of Appeals for the Ninth Circuit. Norman Breeland, Appellant, vs. Southern Pacific Company and E. D. Moody, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit
No. 14670

NORMAN BREELAND,

Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and E. D. MOODY,

Defendants-Appellees.

STATEMENT OF POINTS

Appellant submits the following as his Statement of Points on which he intends to rely in this appeal:

Point I: The trial court erred in granting Appellees' Motion for Summary Judgment on January 13, 1955, in that the trial court's previous order of March 3, 1954, denying Appellees' Motion for Summary Judgment was a bar to a subsequent motion on the same grounds with the same factual situation.

Point II: The trial court erred in granting Appellees' Motion for Summary Judgment in that the trial court erroneously interpreted the collective bargaining agreement at issue herein.

The trial court interpreted a particular provision of the agreement as setting up a one-year limitation on filing court actions for wrongful discharge. No evidence was taken on this factual issue.

Dated: March 8, 1955.

/s/ THOMAS C. PERKINS,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1955.

No. 14,670

IN THE

United States Court of Appeals
For the Ninth Circuit

NORMAN BREELAND, *Appellant,* vs. SOUTHERN PACIFIC COMPANY and E. D. MOODY, *Appellees.*	}

APPELLANT'S OPENING BRIEF.

THOMAS C. PERKINS,
801 9th Street, Sacramento, California,
Attorney for Appellant.

FILED

MAY 24 1955

PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Jurisdictional statement 1

Statement of the case.. 2

1. Statement of pleadings.. 2

2. Questions presented 3

Statement of facts.. 4

Specification of errors.. 6

Summary of argument.. 7

Argument 8

1. Denial of a motion for summary judgment bars a subsequent motion for summary judgment on the same grounds 8

2. An action for wrongful discharge may be prosecuted in the courts by a discharged employee who has exhausted the administrative remedies prescribed by his collective bargaining employment agreement.......... 10

Conclusion 14

Table of Authorities Cited

Cases

Pages

Barker v. Southern Pacific, 214 F. 2d 910 (1954) 10, 12

Buberl v. Southern Pacific, 94 F. Supp. 11 (N.D. Calif. 1950) 10, 11, 12

Collard v. Reconstruction Finance Corp., 103 F. Supp. 794 9

Fraser v. Doing, 130 F. 2d 617 10

Garden City Chamber of Commerce v. Wagner, 104 F. Supp. 235 9

Jensen v. McCartney, 95 F. Supp. 598 13

Kasper v. Brown, 191 F. 2d 734 13

Wallace v. Southern Pacific, 106 F. Supp. 742 (N.D. Calif. 1951) 10, 11, 12

Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co., 181 F. 2d 341 14

Rules

Federal Rules of Civil Procedure, (28 U.S.C.A.), Rule 56 .. 1, 13

Codes

28 U.S.C.A., Section 1291 2

28 U.S.C.A., Section 1441 2

No. 14,670

IN THE

United States Court of Appeals
For the Ninth Circuit

NORMAN BREELAND,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY and E. D. MOODY,
Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a summary judgment entered against appellant in the District Court of the United States for the Northern District of California, said judgment having been entered upon motion by appellees pursuant to Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. (T.R. 35, 36.)

Appellant instituted the action by complaint filed in the Superior Court of the State of California in and for the City and County of San Francisco. (T.R. 18.) On Petition for Removal from State Court to Federal Court by appellees under the provisions of

28 U.S.C.A., Sec. 1441, the action was removed to the District Court. (T.R. 3.)

Appeal to this Court is prosecuted pursuant to the provisions of 28 U.S.C.A., Sec. 1291.

STATEMENT OF THE CASE.

1. Statement of Pleadings.

Appellant's suit, filed December 22, 1953, is for damages for breach of contract. The complaint alleges that appellant was employed as a brakeman by appellee Southern Pacific Company, his employment being pursuant to a collective bargaining agreement between Southern Pacific Company and the Brotherhood of Railroad Trainmen; that appellant was discharged from his employment wrongfully and without just cause and in violation of the said agreement. Damages for this breach are claimed for loss of wages and seniority, pension and hospital benefits.

On January 11, 1954, prior to answering, appellee filed a Motion for Summary Judgment based on the papers, files and pleadings in the action and an affidavit of Mr. E. H. Eyler, alleged to be employed by appellee Southern Pacific Company as a Special Assistant engaged in handling labor relations for appellee. (T.R. 17.) Incorporated in the affidavit as exhibits are copies of letters exchanged between appellee Southern Pacific Company and the Brotherhood of Railroad Trainmen, the labor representative of appellant, negotiating for the reinstatement of appellant

after his discharge. (T.R. 22-29.) On March 1, 1954, Honorable Michael J. Roche, United States District Judge, made an Order denying Motion for Summary Judgment. (T.R. 29, 30.)

On March 11, 1954, appellees filed their answer (T.R. 30-34), alleging as a separate defense that appellant had failed to submit or process his grievance within a one year period as required by Article 58 of the collective bargaining agreement in force during appellant's employment and appellant's cause of action was thereby barred. (T.R. 34.) This issue was the basis of appellees' Motion for Summary Judgment made prior to answering.

On December 29, 1954, Appellees filed a second Motion for Summary Judgment, based on the identical affidavit and exhibits relied on in the Motion for Summary Judgment filed January 11, 1954, and on the identical grounds of the first motion. Judgment in favor of appellees on this second motion was granted by the Honorable Louis E. Goodman, United States District Judge, on January 14, 1955. There was no testimony taken at any point in the proceedings and the record herein consists solely of the pleadings, comprising the complaint, answer, two motions for summary judgment with affidavits in support thereof.

2. Questions Presented.

The question for decision herein is:

Did the trial court err in granting summary judgment to appellees?

The answer to this basic question necessitates findings on the specific questions raised by appellant in this appeal:

1. Is an order of the court denying summary relief a bar to a second motion for summary relief in the same issues?

2. Did appellant exhaust the administrative remedies under the collective bargaining agreement under which he was employed?

3. Did the trial court err in determining appellant's action to be a time claim within the purview of Article 58 of the collective bargaining agreement herein, in the absence of any evidence as to the meaning or accepted interpretation of the term "time claim"?

STATEMENT OF FACTS.

The factual situation must be gleaned from the allegations of the pleadings as no evidence was taken other than an affidavit submitted by appellees.

Appellant's complaint, filed December 22, 1953, alleges employment as a brakeman for appellee Southern Pacific Company under the terms of a written collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen, by the terms of which appellant was not to be discharged except for just cause and after a fair and impartial investigation. That on November 30, 1949, appellant was unjustly accused of intoxication while on duty. On September 5, 1950, appellant was discharged wrongfully and without just cause. (T.R. 10-11.)

Appellees' affidavit, together with exhibits in support of Motion for Summary Judgment, discloses appellant was notified of dismissal for violation of Rule "G" by letter of B. W. Mitchell, Superintendent, San Joaquin Division, dated December 2, 1949. (T.R. 23.) Thereafter certain correspondence was exchanged between appellant and his representatives of the Brotherhood of Railroad Trainmen and appellee Southern Pacific Company, the subject of the correspondence and conferences therein referred to being the reinstatement of appellant to his employment with appellee company. (T.R. 26-29.)

Article 58 of the collective bargaining agreement sets forth the procedural steps to be followed by a dismissed or disciplined employee of appellee company. (T.R. 20.) Article 58, Section (c), Item (6), provides as follows:

> "Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer's decision such claim is disposed of . . . or proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative . . . is interpreted to mean that the decision by the highest officer designated by the carrier to handle *time claims* shall be final and binding unless within one (1) year from the date of said officer's decision . . . proceedings for final disposition are instituted. . . ." (Emphasis added.)

As disclosed by the letter exhibits herein (T.R. 22-29) appellant's representatives were following the

procedural steps prescribed by Article 58 for reinstatement of appellant. On August 11, 1950, appellant's case was discussed in conference as provided by Item 5 of Article 58. (T.R. 21.) Thereafter, by letter of September 5, 1950, Mr. H. R. Hughes, Assistant General Manager of appellee Southern Pacific Company, designated as the highest officer to handle disputes under Article 58, denied appellant's request for reinstatement. (T.R. 21.)

SPECIFICATION OF ERRORS.

Appellant makes the following specification of error as points upon which he intends to rely on appeal herein:

1. The trial court erred in granting appellees' Motion for Summary Judgment on January 13, 1955, in that the trial court's previous order of March 3, 1954, denying Appellees' Motion for Summary Judgment was a bar to subsequent motion on the same grounds with the same factual situation.

2. The trial court erred in granting Appellees' Motion for Summary Judgment in that the trial court erroneously interpreted the collective bargaining agreement at issue herein.

The trial court interpreted a particular provision of the agreement as setting up a one-year limitation on filing court actions for wrongful discharge. No evidence was taken on this factual issue.

SUMMARY OF ARGUMENT.

1. Denial of a motion for summary judgment bars a subsequent motion for summary judgment on the same grounds.

It is herein contended by appellant that the legal doctrine of res judicata applies to motions for summary relief and that the denial of a motion for summary judgment amounts to a legal determination of the issues adjudicated by said motion. A subsequent motion to re-determine these same issues cannot be sustained.

2. An action for wrongful discharge may be prosecuted in the courts by a discharged employee who has exhausted the administrative remedies prescribed by his collective bargaining employment agreement.

Appellant's contentions hereunder are that he has complied with all the contractual provisions of his collective bargaining agreement for reinstatement to his former employment. Thus he had alternative remedies of applying for relief to the Railroad Adjustment Board pursuant to the Railroad Labor Act to seek reinstatement or suing for damages for wrongful discharge in the courts. Having exhausted the administrative remedies he has brought himself within the terms of the collective bargaining agreement and may sue for breach thereof, the breach being his wrongful discharge.

The limitation of one year for commencing proceedings for final disposition of a claim provided by Article 58(c), Item (6), relied on by appellees as a bar to appellant's claim, is confined to *time* claims

and has no application to an action for breach of contract for wrongful discharge.

The trial court erred in interpreting this provision of Article 58 as applying to appellant's cause of action in that there was no evidence before the court as to the meaning or accepted interpretation of the term "time claims."

ARGUMENT.

1. DENIAL OF A MOTION FOR SUMMARY JUDGMENT BARS A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT ON THE SAME GROUNDS.

As the pleadings disclose, appellees initially moved for summary judgment prior to answering. Through a supporting affidavit they contended appellant was barred from prosecuting his cause of action by an alleged failure to exhaust the administrative remedies prescribed by the collective bargaining agreement, and more particularly, by an alleged failure to bring suit within the time limitations of Article 58 of said agreement. This motion was denied by the trial court (T.R. 29) and appellees answered, raising defensively the same objections made by the previous motion for summary judgment. After answering, appellees made a second motion for summary judgment, based on the same affidavit and on the same grounds as the original motion. (T.R. 35.)

The allegations of the answer injected no new factual material into the controversy which had not been covered in the original motion for summary

judgment. It cannot, therefore, revive the issue as to the justiciable nature of appellant's claim. *Garden City Chamber of Commerce v. Wagner,* 104 Fed. Supp. 235. The trial court's ruling on the initial motion for summary judgment had already determined the sufficiency of the complaint and the right to prosecute his cause of action.

In *Garden City Chamber of Commerce v. Wagner,* supra, the defendant's initial motion for summary judgment made prior to answering was denied. After answering, defendant made a second motion for summary judgment, contending there was no genuine issue as to any material fact. The court denied the second motion, holding that the previous decision sustaining the sufficiency of the complaint and the meritorious nature of plaintiff's claim had become a final determination of the particular issue and it could not be urged a second time.

In *Collard v. Reconstruction Finance Corp.,* 103 F.Supp. 794, the decision of the district court in denying a motion to dismiss was controlling on a subsequent motion by defendant for summary judgment as to the reasons considered by the court in ruling on the former motion and again urged in support of the motion for summary judgment, despite the technical difference between the motions for dismissal and for summary judgment.

There is authority that a second motion for summary judgment based on different grounds than a prior motion which was denied is proper, or if the order denying the motion in the original proceedings

was made without prejudice to defendant's rights to renew. *Fraser v. Doing,* 130 F. 2d 617.

In the case at bar, the second motion was made on the same grounds as the original motion. The order on the original motion was not made without prejudice to appellees' rights to renew the motion. The order in the original proceedings for summary judgment had determined the sufficiency of appellant's complaint and the justiciable nature of appellant's cause of action and was therefore a bar to the subsequent motion.

---

2. AN ACTION FOR WRONGFUL DISCHARGE MAY BE PROSECUTED IN THE COURTS BY A DISCHARGED EMPLOYEE WHO HAS EXHAUSTED THE ADMINISTRATIVE REMEDIES PRESCRIBED BY HIS COLLECTIVE BARGAINING EMPLOYMENT AGREEMENT.

The trial court, in granting appellees' motion for summary judgment, relied on three cases: *Barker v. Southern Pacific,* 214 F. 2d 918 (1954); *Wallace v. Southern Pacific,* 106 F. Supp. 742 (N.D. Calif. 1951); and *Buberl v. Southern Pacific,* 94 F. Supp. 11 (N.D. Calif. 1950).

The *Wallace* and *Buberl* cases were decided prior to appellees' initial motion for summary judgment. The *Barker* case was decided in the intervening period between appellees' first and second motions. The trial court held that the law relating to appellant's action had been changed by the *Barker* case. A review of the rulings in all the cases appears to refute this.

In *Buberl v. Southern Pacific,* supra, plaintiff sued to recover damages for loss of earnings due to defendant's alleged failure to reinstate him as an employee, the suit being based on a contract between defendant and the Brotherhood of Railroad Trainmen. The court granted summary judgment to defendant on two grounds:

1. A jury award in a prior tort action for personal injuries between the same parties compensated plaintiff for any loss of earnings.

2. The collective bargaining agreement governing plaintiff's employed required employees dissatisfied with their Superintendent's decision to appeal to the General Manager, which plaintiff failed to do.

In *Wallace v. Southern Pacific,* supra, plaintiff sought damages for wrongful discharge, claiming breach of the collective bargaining agreement covering plaintiff's employment. The agreement provided that certain administrative steps for reinstatement be taken by a discharged or disciplined employee, including the presentation in writing to defendant of a grievance within sixty days of dismissal. Plaintiff failed to so present his grievance.

The court ruled in favor of defendant Southern Pacific on three grounds:

1. plaintiff's discharge had been proper;

2. plaintiff had been compensated by a prior personal injury settlement between the same parties;

3. plaintiff failed to pursue the administrative remedies provided by the contract of employment.

In *Barker v. Southern Pacific,* supra, suit was filed for damages for wrongful discharge, plaintiff being employed by defendant under a collective bargaining agreement requiring a dismissed employee to file a written notice for a hearing within ten days of dismissal or the cause of action was deemed abandoned. Plaintiff failed to file such notice.

The court granted summary judgment to defendant, ruling that filing a request for a hearing was a condition precedent to either further grievance proceedings under the contract or resort to courts of law.

The holding in the *Barker* case is directly in line with those of the prior *Buberl* and *Wallace* cases, that administrative remedies must be exhausted prior to recourse to the courts.

Appellant concedes this to be the law. Appellant contends, however, that he exhausted the administrative remedies required by his contract. He appealed to the Superintendent within the time limitation and from that decision to the General Manager, the highest officer designated to handle claims. There are no further administrative steps to be taken by appellant under the agreement. On September 5, 1950, appellant was notified by the General Manager that he would not be reinstated to his position. At that point, appellant had one of two courses of action open to him; he could present his case before the National Railroad Adjustment Board pursuant to the provisions of 45 U.S.C.A. 151 et seq. or sue on his statutory cause of action for wrongful discharge. Obviously he could

not be expected to repeat the administrative steps a second time.

Article 58 (c), Item (6), relied on by appellees as barring appellant's action, provides that decision by the highest officer designated by the carrier to handle *time* claims shall be final and binding unless proceedings for final disposition of the claim are commenced within one year. Appellant admittedly did not file suit within one year from September 5, 1950, the date of the letter refusing reinstatement from the Assistant General Manager. The meaning of "time claims" and Item (6) of Article 58 (c) thereupon became a material issue of fact. No evidence was taken. The interpretation set forth by Mr. Eyler in appellees' affidavit (T.R. 22) was admittedly inadmissible and only admissible evidence may be considered in summary judgment proceedings pursuant to Rule 56 (c) F.R.C.P. No findings of fact or conclusions of law were made by the district court in granting appellees' motion.

Material issues of fact may not be tried and determined on motions for summary judgment (*Kasper v. Baron,* 191 F. 2d 734) and if there is any genuine issue as to any material fact, summary judgment must be denied. Rule 56 (c), F.R.C.P., *Jensen v. McCartney,* 95 F. Supp. 598.

Where the facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn, the court errs in granting summary judg-

ment without making any express findings of fact and conclusions of law. *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.,* 181 F. 2d 341.

It is respectfully urged that a genuine issue of fact exists herein as to whether or not appellant's action is within the limitation period set forth in Article 58 (c), Item (6) of the collective bargaining agreement. In the absence of express findings of fact and conclusions of law by the district court, it cannot be determined how and in what manner appellant's action comes within these restrictive provisions.

CONCLUSION.

It is respectfully submitted that the summary judgment herein should be reversed for the reasons hereinabove set forth and the cause remanded to be set for trial on the merits.

Dated, Sacramento, California,
May 6, 1955.

THOMAS C. PERKINS,
Attorney for Appellant.

No. 14,670

In the

United States Court of Appeals

For the Ninth Circuit

NORMAN BREELAND,	
	Appellant,
vs.	
SOUTHERN PACIFIC COMPANY and E. D. MOODY,	
	Appellees.

Brief for Appellees

BURTON MASON
W. A. GREGORY
65 Market Street
San Francisco 5, California
Attorneys for Appellees

FILED
JUN 29 1955
PAUL P. O'BRIEN, CLERK

Dated at San Francisco, June 28, 1955.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

Page

Appellees' Statement of the Case 1

Questions Presented 4

Summary of Appellees' Argument 5

Argument 6

A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the applicable time-limit provided in the agreement relied on 6

1. The unchallenged facts show that appellant, in undertaking to proceed with his action, failed to comply with an essential requirement of the agreement upon which the suit is based 6

2. The District Court did not undertake to determine whether appellant's claim here in suit was or was not a "time claim", as that term is used in the agreement. Such determination was neither necessary, nor even material, to the judgment appealed from 20

B. In the circumstances here disclosed, the District Court did not commit prejudicial error in granting appellees' second motion for summary judgment, notwithstanding that their earlier motion had been denied 26

1. The granting of the second motion was not barred by the fact that the earlier motion had been denied 26

2. Even assuming, for the sake of argument, that the better practice would have been to have denied appellees' second motion, it is nevertheless apparent that the granting of said motion was, at most, harmless error 29

Conclusion 33

CASES | Pages

Atlantic Coast Line R. Co. v. Pope, 119 F.2d 39........................ 15

Barker v. Southern Pac. Co., 214 F.2d 918....................................
..............2, 6, 8, 15, 19, 27, 28, 29. 30, 31, 33
Buberl v. Southern Pac. Co., 94 F. Supp. 11...........................9, 17, 19
Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569.... 25

Collord v. Reconstruction Finance Corp., 103 F. Supp. 794......26, 27
Cone v. Union Oil Co., 129 A.C.A. 648, 277 P.2d 464............14, 19, 21
Crow v. Southern Ry. Co., 66 Ga. Ap. 608. 18 S.E. 2d 690........ 15

Davis v. Union Pac. R. Co. (1952), U.S.D.C., Dist. of Nebraska, Omaha Div., Civ. No. 86-50, 21 C.C.H. Lab. Cases, Par. 66,834 15
Division of Labor Law Enforcement, Dept. of Industrial Relations, State of California, v. Pacific Elec. Ry. Co. (1952), Superior Court of California, Appellate Dept., L. A. County, No. Civ. A-7962, 22 C.C.H. Lab. Cases, Par. 67,244........ 15
Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881............ 25
Duminie v. Southern Pac. Co. (Jan. 19, 1953), U.S.D.C., N.D. Cal. S.D., No. 30483-Civ.. 11

Fraser v. Doing, 130 F.2d 617.. 26

Garden City Chamber of Commerce, Inc., v. Wagner, 104 F. Supp. 235 27
Gifford v. Travelers Protective Ass'n, 153 F.2d 209........17, 18, 19, 24

Harrison v. Pullman Co., 68 F.2d 826.. 13
Hornsby v. Southern Ry. Co., 70 Ga. Ap. 467, 28 S.E. 2d 542.. 15

Kliaguine v. Jerome, 91 F. Supp. 809.. 26
Kress v. Fisher, 65 F.2d 682.. 24

Lawrey v. Southern Pac. Co. (Jan. 24, 1953), U.S.D.C., Dist. of Oregon, Civ. No. 6451.. 11
Lindsey v. Leavy, 149 F.2d 899.. 25

Pages

McGlohn v. Gulf & S. I. R., 179 Miss. 396, 174 So. 250 15
Marconi Wireless Co. v. United States, 320 U.S. 1 26
Moore v. Illinois Central R. Co., 180 Miss. 276, 176 So. 593, 24 F. Supp. 731, 112 F.2d 959, 136 F.2d 412 28
Moore v. Scott, etc., Co., 178 F.2d 3 24

Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co., 2 F.R.D. 355 25
Poe v. Southern Pac. Co. (March 3, 1955), U.S.D.C., Nevada, No. 1105 ..... 11, 12, 21

Reed v. St. Louis S. W. R. Co., 95 S.W. 2d 887 13

Simmons Co. v. Grier Bros. Co., 258 U.S. 82 26
Simpson Bros. v. District of Columbia, 179 F.2d 430 25

Taylor v. Southern Pac. Co. (June 8, 1955), U.S.D.C., N.D. Cal. S.D., No. 31812-Civ 11, 12
Texas & N. O. R. Co. v. McComb, 143 Tex. 257, 183 S.W. 2d 716 28
Tobin Quarries v. Central Nebraska District, 64 F. Supp. 200 (affd. 157 F.2d 483) 24, 25, 31
Transcontinental & Western Air, Inc., v. Koppal, 345 U.S. 653 ..... 13, 19, 28, 29, 33

United R. Workers v. Atchison, T. & S. F. Ry. Co., 89 F. Supp. 666 15
United States v. Board of Com'rs, 53 F.Supp. 395 25
United States v. Lundstrom, 139 F.2d 792 24

Wallace v. Southern Pac. Co., 106 F. Supp. 742 ..... 9, 11, 17, 19, 21
Willman v. Southern Pac. Co. (1948), U.S.D.C., N.D. Cal. N.D., No. 5937 ..... 10, 11, 17, 19, 21
Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co., 181 F.2d 341 25

Youmans v. Charleston & W. C. Ry. Co., 175 S.C. 99, 178 S.E. 671 15

STATUTES Pages

California Code of Civil Procedure
Section 335 32
Section 337 .... 4, 32

TEXTS

11 C.J.S., ''Contracts'', Sect. 616 24

6 Moore's Federal Practice, 2nd Ed.,
Page 2045 27
Page 2099 .... 26, 27

3 Williston on Contracts, Sect. 616 24

53 Amer. Juris., Sect. 266 24

No. 14,670

In the

United States Court of Appeals

For the Ninth Circuit

Norman Breeland, *Appellant,* vs. Southern Pacific Company and E. D. Moody, *Appellees.*	

Brief for Appellees

APPELLEES' STATEMENT OF THE CASE

On December 22, 1953, appellant filed in the Superior Court of California a complaint (R. 8-11) against appellees, Southern Pacific Company (hereinafter referred to as "the Company") and E. D. Moody, as co-defendants, alleging that appellant, formerly employed as a brakeman by the Company, had been unjustly dismissed on September 5, 1950. It was claimed, in effect, that by such action the Company had violated the written collective bargaining agreement covering appellant's employment: i.e., the agreement between the employees represented by the Brotherhood of Railroad Trainmen, and the Company, effective December 16, 1939, as amended.

On petition of the Company, on December 16, 1953, the action was removed to the United States District Court for the Northern District of California, Southern Division (R. 13-16). Thereafter, on March 1, 1954, appellees presented to that Court their motion for summary judgment (R. 17), with a supporting affidavit by H. E. Eyler (R. 18-29). No opposing affidavit was filed by or on behalf of appellant. On March 3, 1954, the District Court, speaking through Judge Michael J. Roche, filed its order (without opinion) denying said motion (R. 29-30).

Answer was duly filed by appellees on March 11, 1954 (R. 30-34), presenting separate affirmative defenses as follows: (a) appellant's failure to state a claim upon which relief could be granted (R. 32); (b) appellant's failure to file his action within four years from the date of his dismissal, as required by the applicable provisions of the California Statute of Limitations (R. 32); and (c) appellant's failure to comply with the conditions required of him by the agreement upon which his action is based (R. 33).

Subsequent to the denial of appellees' motion for summary judgment referred to above (i.e., on August 10, 1954), this Court handed down its decision in *Barker v. Southern Pac. Co.,* 214 F.2d 918. In that case, the issue of law decided by this Court was identical with the principal issue of law presented here.

In view of the *Barker* decision, appellees presented on December 28, 1954, a second motion for summary judgment (R. 35), again duly supported by affidavit. Again appellant failed to file any opposing affidavit.

The facts developed by this record, including the complaint (R. 8-11), the answer (R. 30-34), and the supporting affidavit filed by appellees (R. 18-29), show without dispute the following: (1) appellant's employment was governed

by the collective bargaining agreement between the Company, and its employees represented by the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939 (hereinafter generally referred to as "the Agreement") (R. 9. 18, 31): (2) appellant was dismissed from the Company's service on December 2, 1949, for violation of the Company's Transportation Rule "G" (R. 19, 31); (3) Article 58 of the agreement, entitled "Limitation in Presenting Grievances". provides in Section (c), Item 6, that in respect to any claim coming under Article 58, the decision of the highest officer designated by the carrier to handle time claims shall be final and binding unless, within one year from the date of his decision, proceedings for the final disposition of the claim are instituted by the employee (R. 20-21, 33-34); (4) on September 5, 1950, Mr. H. R. Hughes, who was then Assistant General Manager of the Company, and designated as the highest officer of the carrier to handle disputes falling within the purview of Article 58, rendered his written decision denying appellant's claim for reinstatement and pay for time lost since his dismissal, all as provided in Article 58, Section (c), Item 6 (R. 21, 28-29); and (5) no proceedings of the character specified in Item 6 were brought by appellant, either before the National Railroad Adjustment Board (in accordance with Section 3 of the Railway Labor Act, 45 U.S.C. 153), or in court, within the one-year period next following the decision of September 5, 1950, or at all until the commencement of this action on December 22, 1953 (R. 22, 34).

While the summary judgment was based upon the failure of appellant to comply with the agreement provision last referred to, it also affirmatively appears, from the unchallenged facts of record, that this action is barred by the

expiration of the four-year limitation period provided by Section 337 of the California Code of Civil Procedure. Appellant was dismissed on December 2, 1949 (R. 19, 23, 31), and acknowledged his said dismissal the next day (R. 24). Nevertheless, he did not commence his action until December 22, 1953 (R. 3, 13, 22).

Appellees' second motion was duly argued and submitted to the District Court on January 10, 1955. On January 13, 1955, that Court, speaking through Judge Louis E. Goodman, granted the motion, and ordered judgment in favor of appellees, which was duly entered on January 14, 1955 (R. 36-37). Appellant thereupon (January 21, 1955) filed notice of appeal (R. 37).

QUESTIONS PRESENTED

As indicated by appellant in his brief (p. 3), the broad question before this Court upon this appeal is whether, in the light of the applicable principles of law as stated by this Court, the District Court erred in rendering summary judgment in favor of appellees. More precisely, and having in mind the essential allegations of the complaint, the argument in the District Court on the motions for summary judgment, and the appellant's statement of the points to be relied upon, "the specific questions" presented on this appeal are as follows (rather than as appellant has sought to state them: his brief, p. 4):

1. May a former employee maintain an action at law against the employer for alleged unlawful discharge in violation of a collective bargaining agreement, where it affirmatively appears, and is not disputed, that the employee has wholly failed to comply with an express provision of the agreement which, by its terms, is directly applicable to the maintenance of such an action?

2. When the pertinent provisions of a collective bargaining agreement are clear and unambiguous, and their application by the parties to the agreement in similar situations is fully established by undisputed evidence, and there is no dispute as to any material fact, does the trial court err in rendering summary judgment?

3. Did District Judge Goodman commit prejudicial error in granting summary judgment, notwithstanding that another District Judge had denied an earlier motion based upon the same grounds, where it appeared that subsequent to the earlier ruling this Court had rendered a controlling decision?

SUMMARY OF APPELLEES' ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred, and in granting summary judgment upon that basis:

(1) The admitted or unchallenged facts show that appellant wholly failed, in connection with the commencement of this action, to comply with a specific provision, forming a part of the necessary procedural steps set forth in the agreement upon which he relies, as constituting essential requirements to the maintenance for such an action.

(2) The District Court did not, in rendering its summary judgment herein, undertake to determine whether appellant's claim or demand here in suit was a "time claim", as that term is used in the applicable provisions of the collective agreement. Such determination was neither necessary, nor in any sense material, to the judgment appealed from.

B. In the circumstances of this case, and in view of this Court's controlling decision in the *Barker* case, 214 F.2d 918, the District Court did not commit prejudicial error in granting appellees' second motion for summary judgment, notwithstanding that the earlier motion had been denied:

(1) The granting of said second motion was in no sense barred by reason of the denial of the earlier motion:

(2) Even if it could be argued that in the circumstances the second motion might properly have been denied, the undisputed facts show that the granting of said motion was at most a harmless error, and did not result in prejudice to appellant.

ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the applicable time-limit provided in the agreement relied on.

1. THE UNCHALLENGED FACTS SHOW THAT APPELLANT, IN UNDERTAKING TO PROCEED WITH HIS ACTION, FAILED TO COMPLY WITH AN ESSENTIAL REQUIREMENT OF THE AGREEMENT UPON WHICH THE SUIT IS BASED.

As disclosed by the complaint itself (R. 9-10), and fully stated by appellant in his brief (at pp. 2-4), this is an action to recover damages for alleged wrongful discharge, claimed to have been in violation of the collective bargaining agreement between the Company and its employees represented by the Brotherhood of Railroad Trainmen. The record also shows, and again without dispute, that after appellant had been notified by letter dated December 2, 1949, that he had been dismissed from the Company's service (R. 23-24), he and his representatives undertook to handle his claim, designated (R. 27) as a claim "for reinstatement with senior-

ity unimpaired * * * and *compensation for time** lost as result of his dismissal", in accordance with the agreement, particularly the provisions of Article 58 thereof (R. 22-29). Appellant himself declares (his brief, pp. 5-6) that his representatives followed the procedural steps prescribed by Article 58, in handling his claim. The recital of the steps thus followed, appearing in the affidavit of H. E. Eyler in support of appellees' motion for summary judgment (R. 19-20), confirms such handling.

Item 6 of Section (c) of Article 58, which is the portion directly applicable here, is quoted in full in the Eyler affidavit (R. 20-21), and also in part by appellant (brief, p. 5). Compare, also, paragraph 1 of the third separate defense set forth in appellees' answer (R. 33-34), in which the title of the article is shown to be "Limitation in Presenting Grievances", and Item 1 of Section (c) thereof is also quoted. It will be noted that Item 6 in terms provides that the decision of the highest officer designated by the carrier to handle time claims shall be final and binding, unless within one year from the date of said decision proceedings for final disposition are instituted (R. 21, 33).

The undisputed facts also show, and again appellant agrees, that in connection with appellant's claim the final decision of the highest officer designated to handle disputes under Article 58 was rendered on September 5, 1950 (appellant's brief, p. 6). The Eyler affidavit shows (R. 21) that Mr. H. R. Hughes, Assistant General Manager of the Company, who rendered the decision of September 5, 1950 (R. 28-29), was designated as the highest officer to handle disputes falling within the purview of Article 58. He was recognized as such by the General Chairman of the Brother-

---

*Emphasis in quotations has been supplied, unless otherwise noted.

hood of Railroad Trainmen, who had duly progressed appellant's claim to him (see the General Chairman's letter of May 24, 1950, R. 27-28), after the claim had been denied by the Division Superintendent. In appellant's brief (p. 6), it is stated that Mr. Hughes was "designated as the highest officer to handle disputes under Article 58".

Appellant's suit, based upon the claim made following his discharge on December 2, 1949 (i.e., for loss of past and prospective wages, etc., but omitting the previous demand for reinstatement), was not filed until December 22, 1953, or more than three years and three months after the date of the final decision of the highest officer designated to handle claims coming under Article 58. As appellant himself says (brief, p. 13):

> "Appellant admittedly did not file suit within one year from September 5, 1950, the date of the letter refusing reinstatement from the Assistant General Manager."

There was thus a clear failure on the part of appellant to comply with the express terms of the contract upon which he relies and, indeed, with the express terms of the very article of the agreement which alone may be relied upon as a basis for his action.

The law is well settled in this Circuit, particularly by the controlling decision of this Court in *Barker v. Southern Pacific Co., supra,* that in these circumstances appellant has no subsisting cause of action, and that if the essential facts are made to appear without challenge, a motion for summary judgment should be sustained.

In the *Barker* case, the employee had brought suit for damages for alleged wrongful discharge, in violation of the collective bargaining agreement applicable to his employment. Under that agreement a dismissed employe

was required to present within ten days after dismissal a written request for a hearing; failing in which, as the agreement rule said, "the cause for action shall be deemed to have been abandoned". Summary judgment was rendered upon defendant's motion, and an undisputed showing that timely request for a hearing had not been made. Upon the employee's appeal, this Court said (214 F.2d, p. 919):

> "* * * The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled. Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of contract. *The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.*"

There have been numerous cases in the District Courts in this Circuit, in which the same principles have been applied. In *Buberl v. Southern Pac. Co.*, 94 F.Supp. 11 (N.D.Cal., 1950), the complaint was founded upon the same collective bargaining agreement relied upon in the case at bar. Defendant's motion for summary judgment was granted for two reasons, one of which was stated by the Court as follows (94 F.Supp., p. 12):

> "Judgment must also be for the defendant for another reason. The collective bargaining agreement, and the agreed interpretations thereof, which governed plaintiff's employment, require employees who are dissatisfied with the decision of their Superintendent on any claim respecting employment to notify him of their intention to appeal to the General Manager or his representative. This plaintiff failed to do."

A second case in the same District Court, also involving the same agreement upon which the present suit is based, was *Wallace v. Southern Pac. Co.*, 106 F.Supp. 742 (N.D.

Cal., 1951). In its published findings of fact and conclusions of law, the Court referred to Article 58(c) of the agreement, and the interpretation thereof, and the failure of the employee plaintiff to comply with the requirements stated therein. In Conclusion of Law No. 4 the Court said (106 F. Supp., p. 745):

> "Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any claim or grievance arising from his dismissal on January 23, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Another case, involving again the same agreement, was *Willman v. Southern Pac. Co.* (1948), U.S.D.C., N.D.Cal. N.D., No. 5937. In that case the Court, speaking through Judge Lemmon (now a member of this Court), rendered judgment for defendant, and adopted the following as its third conclusion of law:

> "3. Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any rights arising from his dismissal on June 21, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any grievance, i.e., claim that he was

discharged in violation of the terms of the collective bargaining agreement, and any and all rights which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. That plaintiff's grievance was not presented within the time therein provided."

It will be noted that the Court's conclusion in the later *Wallace* case was practically identical with the corresponding conclusion in the *Willman* case.

Other recent cases in point, decided in the District Courts in this Circuit, include:

Duminie v. Southern Pac. Co. (Jan. 19, 1953), U.S.D.C., N.D.Cal.S.D., No. 30483-Civ.;

Lawrey v. Southern Pac. Co. (Jan. 24, 1953), U.S. D.C., Dist. of Oregon, Civ. No. 6451;

Poe v. Southern Pac. Co. (March 3, 1955), U.S.D.C., Nevada, No. 1105;

Taylor v. Southern Pac. Co. (June 8, 1955), U.S.D.C., N.D.Cal.S.D., No. 31812-Civ.

In the *Duminie* case, the Court said:

"Although plaintiff claims the benefits of one or the other of two collective bargaining agreements, he can not recover thereunder in any event, because of his complete failure to prove compliance with the procedural provisions and express time limitations set forth therein, which provisions are conditions precedent to the assertion of a claim of violation of the agreement; and any and all rights or claims which he may have had as a result of such asserted violation ceased to exist when he failed to present his grievance or claim in accordance with said provisions."

In the *Lawrey* case, the District Court for Oregon said:

"Plaintiff may not assert any rights under the contract between defendant and the Railway Patrolmen's

Union when plaintiff has not complied with the time limitation set forth in the grievance procedure of the contract."

In the *Poe* case, the District Court for Nevada entered summary judgment for the defendant, making findings as follows:

"7. No grievance or claim asserting that plaintiff's dismissal was improper, or in violation of the agreement aforesaid, or that plaintiff was not at fault in respect to said violations of rules and instructions, was filed by plaintiff in writing within the sixty days next following December 17, 1951, or at any other time, at all, as required by Article 25, Section 4(a) of the applicable agreement. Specific compliance with the successive steps set out in the agreement is an essential condition precedent to the prosecution of plaintiff's cause of action.

* * * * * * *

10. Plaintiff failed to institute any proceedings at all before the National Railroad Adjustment Board relating to or including the claim of agreement violation upon which this action is predicated. Plaintiff likewise failed to institute any action or proceeding based upon said claim of agreement violation, in any court or tribunal having jurisdiction, within six months next following either December 17, 1951, or December 5, 1952, or February 10, 1953, or at all until the filing of this action on August 25, 1953. Said claim, or any action based thereon, is and are wholly barred by virtue of the provisions of Article 25, Section 4(c) of said agreement."

In the *Taylor* case, the Court, in entering judgment for the defendant, adopted the following as its Conclusion of Law No. 8:

"8. Plaintiff cannot recover under the applicable collective bargaining agreement, because of his com-

> plete failure to comply with the successive steps set out in Article 67 of the Agreement covering conductors, which were essential conditions precedent to the creation and maintenance of his cause of action."

If any doubt still existed as to the principle that an employee who brings an action for unlawful discharge, predicated upon a collective agreement, must show compliance with the terms of that agreement, that doubt was set at rest by the decision of the Supreme Court in *Transcontinental & Western Air, Inc., v. Koppal,* 345 U.S. 653 (June 1, 1953). In that case the Supreme Court cited with approval the decisions in *Harrison v. Pullman Co.,* 68 F.2d 826 (C.A. 8, 1934), and *Reed v. St. Louis S. W. R. Co.,* 95 S.W.2d 887 (Mo. App., 1936). In each of the cited cases, suits by employees for unlawful discharge were dismissed, it having been shown that neither of the employee plaintiffs had complied with the provisions governing the handling of such claims, as set forth in the applicable agreements. The Supreme Court accordingly held that since the law of Missouri required an employee to exhaust the administrative remedies under his employment contract, in order to sustain his cause of action, and it appeared that he had failed to do so, the judgment of the District Court dismissing his complaint must be affirmed. Specifically, the Court said (345 U.S., p. 662):

> "* * * Here respondent [the employee] was employed by a carrier subject to * * * the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

Of interest also, as indicating the present state of the law of California in respect to this question, is the decision of the District Court of Appeal for the Second District in *Cone v. Union Oil Co.*, 129 A.C.A. 648, 277 P.2d 464 (Dec. 15, 1954). This was a suit by an employee, based upon an alleged failure of the defendant employer to comply with the terms of a collective bargaining agreement; and it was made to appear, by the affidavit filed by the defendant in support of its motion for summary judgment, that the plaintiff had initiated a grievance, identical in terms with the subject-matter of her complaint, and had pursued the grievance procedure provided for in the agreement, through six of the seven steps therein required. She had failed, however, to comply with the seventh step: namely, the timely initiation of arbitration proceedings leading to final adjudication. In that case (as in the case at bar), defendant's affidavit in support of its motion was not challenged or controverted. The trial court was therefore entitled to accept as true the facts therein stated, to the extent that the person making the affidavit was competent to testify.

The District Court of Appeal held that the trial court had not erred in granting the motion for summary judgment, saying (129 A.C.A., p. 653):

> "* * * Plaintiff, and the union as her collective bargaining agent, have admittedly failed to complete and exhaust such grievance and arbitration procedures. She is therefore precluded from maintaining the present action. It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies."

The basic principle upon which appellees rely is in fact widely recognized. In addition to the cases cited above, the following also are closely in point:

Atlantic Coast Line R. Co. v. Pope, 119 F.2d 39 (C.C.A. 4, 1941);

Davis v. Union Pac. R. Co. (1952), U.S.D.C., Dist. of Nebraska, Omaha Div., Civ. No. 86-50, 21 C.C.H. Labor Cases, Par. 66,834;

United R. Workers v. Atchison, T. & S.F.Ry. Co., 89 F.Supp. 666 (U.S.D.C. Ill., 1950);

Youmans v. Charleston & W.C.Ry. Co., 175 S.C. 99, 178 S.E. 671 (1935);

McGlohn v. Gulf & S.I.R., 179 Miss. 396, 174 So. 250 (1937);

Division of Labor Law Enforcement, Dept. of Industrial Relations, State of California, v. Pacific Elec. Ry. Co. (1952), Superior Court of California, Appellate Dept., L. A. County, No. Civ. A-7962; 22 C.C.H. Lab.Cases, Par. 67,244;

Crow v. Southern Ry. Co., 66 Ga.Ap. 608, 18 S.E.2d 690 (1942);

Hornsby v. Southern Ry. Co., 70 Ga.Ap. 467, 28 S.E.2d 542 (1944).

In his brief (at p. 12) appellant concedes that this Court in *Barker v. Southern Pac. Co., supra,* has held "that administrative remedies must be exhausted prior to recourse to the courts"; but argues in effect that this rule (of the necessity of compliance with the contract in suit) applies only to the *administrative remedies* set up *in the contract,* and not to the subsequent step of resorting to suit within the time-limit provided by the contract. In other words, appellant contends that he has "exhausted"

the "*administrative* remedies" required by his contract, in progressing his claim for reinstatement (with pay for time lost) up to and including the final denial by the highest officer designated to handle such claims; that by reason of such compliance, he is excused from further compliance with the remaining requirement of the same article and section of the contract, requiring that a suit be commenced within one year from final decision. This is because, so appellant says, the filing of suit is not an *administrative* remedy, there being no *administrative* steps to be taken by appellant after the highest officer's final decision.

Further to support his argument, appellant also says, in effect, that the decision by Assistant General Manager Hughes dated September 5, 1950, and which appellant himself has treated as final, was not in fact a decision by the highest officer of the Company designated to handle *time claims;* and that therefore, presumably, the one-year period never started to run. No attempt is made to explain how a decision by the Company's officer can be a final decision closing out the administrative process, and permitting the filing of suit, and at the same time not a final decision sufficient to start the running of the one-year period. The question presented by appellant's reliance upon the phrase "time claims" is discussed in more detail in the next subdivision of this argument.

As stated, appellant cites no authority for his apparent argument that compliance with the one-year period for the filing of suit is excluded from the general scope of the cited decisions, upholding the principle that an employee who sues in California upon a collective agreement must show that he has complied with all of the necessary steps provided for in the agreement as preliminaries to suit. We are confident that no such authority is available.

Certainly the one-year time-limit for the filing of suit is just as much an essential and integral part of the contract, as are any other of the time-limits provided in the same contract. Compliance with these other limitations was held to be necessary in the *Buberl, Wallace* and *Willman* cases, cited above.

No persuasive reason is suggested by appellant why a distinction should be made. There are, however, both persuasive reasons, and controlling authority, for concluding that each and all of these time-limits should be considered as coming within the same general principle. From this standpoint, the instant case is on all fours with *Gifford v. Travelers Protective Ass'n,* 153 F.2d 209 (C.A. 9, 1946). This was a suit upon an insurance contract, which contained a provision to the effect that if the insurer declined a claim, the period for commencement of suit should be limited to six months from the date of such declination. The defendant insurer moved for summary judgment, upon the ground that the six-month limitation had not been complied with. This motion was sustained by District Judge Goodman of the District Court for the Northern District of California. Upon appeal by the claimant, this Court said (153 F.2d, p. 211):

> "In this case the trial court determined upon the record before it that the plaintiff's suit had been barred by the running of the period of limitations stipulated in the insurance contract, and that there was no genuine issue of any material fact to be determined. There is nothing before this court to justify a reversal of that judgment. Indeed, the trial court delayed its final judgment to give plaintiff an opportunity 'to plead by way of replication any pertinent facts in avoidance of the time limitation.' By failing to avail himself of this opportunity, plaintiff in effect admitted the facts al-

> leged in the affidavit supporting the motion for summary judgment and left the trial court no alternative. [Citing cases.]"

In holding that the time limit provided by the contract was valid and enforceable against the claimant, this Court said further (at p. 211):

> "The certificate of insurance under which appellant claims his rights as beneficiary provided that the Constitution and By-Laws shall constitute the agreement between the member and the association, shall govern the payment of benefits, and 'shall bind said member and his beneficiary or beneficiaries.' How can appellant hope to avoid his responsibilities which are imposed by the same agreement which assures the benefits he seeks in this action?
>
> That an insurer may limit by contract the time within which suit may be brought on the policy has been settled in this jurisdiction (Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 138, 99 P. 501) and by the Supreme Court of the United States. Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 19 L.Ed. 257. Under the California law, a contract may fix the time within which a suit may be brought, whether it be a shorter or longer period than that of the Statute."

The conclusions of this Court in the *Gifford* case completely dispose of any suggestion by appellant that he may avoid the one-year period of limitation upon the ground that technically the filing of suit is not one of the "so-called administrative remedies" provided in the contract. The appellant in the cited case adopted exactly that position; for he alleged, and it was not denied, that he had given due notice to the insurer, as required by the contract, and had been refused payment (thus establishing his compliance with the "administrative" provisions), but claimed

that the time-limitation upon the filing of suit did not apply.

Furthermore, the broad principle of the *Koppal* and *Barker* cases, the numerous decisions of the District Courts of this Circuit, and the other courts which have either anticipated or followed those decisions, requires that the one-year limitation be given effect in the present case. As we read the *Barker* case, and the *Wallace* case which this Court cited therein with apparent approval, the Court was persuaded to its decision upholding the time-limitation in the contarct there in suit, not solely because the giving of the notice therein referred to was a part of the administrative procedure, but because the contract requirement was reasonable, and the aggrieved employee was able readily to comply and should have complied. In short, the provision there sustained was a part of the entire body of the contract upon which the claimant relied, and with which he must comply in order to maintain his action. It was immaterial whether such failure occurred at an initial stage, as in the *Barker* case (immediately after discharge), or during the course of the handling leading to final decision by the delegated highest officer (as in the *Wallace, Willman* and *Buberl* cases), or at the final stage after the intervening procedure had been carried out, as in *Cone v. Union Oil Co.,* the *Gifford* case, and the present case. The essential point is that in all these cases the contracts in suit provided remedies which the claimants were able to pursue to final adjudication by competent tribunals, provided only that in so doing they exercised reasonable diligence, and asserted their claims at successive stages in accordance with the specific time-limits provided in the contracts.

We therefore ask the Court to conclude that since it appears without dispute, and indeed is openly admitted,

that appellant did not commence his action within one year from the date of the final decision denying his claim, rendered by the highest officer of the Company to whom the claim had been duly progressed and presented, the action is wholly barred by the express terms of Item 6 of Section (c) of Article 58 of the agreement upon which the suit is based.

2. THE DISTRICT COURT DID NOT UNDERTAKE TO DETERMINE WHETHER APPELLANT'S CLAIM HERE IN SUIT WAS OR WAS NOT A "TIME CLAIM", AS THAT TERM IS USED IN THE AGREEMENT. SUCH DETERMINATION WAS NEITHER NECESSARY, NOR EVEN MATERIAL, TO THE JUDGMENT APPEALED FROM.

We now address our discussion to that portion of appellant's argument (his brief, pp. 13-14) in which he refers to the use of the term "time claims", in the text of Item 6 of Section (c) of Article 58 (quoted at R. 20-21).

As already noted, it is apparently appellant's position that the final decision of Assistant General Manager Hughes, dated September 5, 1950 (R. 28-29), was not a decision by the highest officer designated by the carrier to handle *time claims*; or, in the alternative (his brief, pp. 7-8), that the one-year limitation in Item 6 applies only to "time claims", and therefore does not apply to appellant's present claim.

Appellant appears also to argue that when the District Court held that the one-year time-limit is applicable to his claim, it necessarily undertook to interpret the phrase "time claims"; and that in so doing the Court decided an issue of *fact*, concerning which no evidence was offered or received. It is asserted that this factual determination was essential and material to the granting of the summary judgment, and that the District Court's was therefore erroneous.

There is no basis for either or any of the contentions thus advanced or suggested by appellant. It was not neces-

sary for the District Court to determine whether appellant's claim was a "time claim"; and it is quite clear that no such determination was made. (In passing, it may be remarked that the demand, as originally presented by appellant through his local chairman and subsequently progressed to the Assistant General Manager by his general chairman, was "for reinstatement with seniority unimpaired, and *claim for compensation for time lost* as a result of his dismissal from the service" (R. 27). As set forth in the complaint (R. 10), the claim was for lost *wages* for an indefinite period of *time*, and for the value of certain other alleged benefits, all interwoven with the wage-claim; the demand for reinstatement having been abandoned.)

In the first place, as emphasized before, appellant's demand, throughout its handling with the Company's officers, was treated as a claim or grievance coming within the scope of Article 58. That article is headed: "Limitation in Presenting Grievances" (R. 20). In the *Wallace* and *Willman* cases, the term "grievance" is used interchangeably with the word "claim"; and compare, also, the *Cone* and *Poe* cases. It is affirmatively shown, without any challenge (R. 21), that Assistant General Manager Hughes, who made the decision of September 5, 1950, was "designated as the highest officer to handle disputes falling within the purview of Article 58". In his brief (at p. 6), appellant asserts that this was the fact, and relies upon the passage above quoted from the Eyler affidavit. Thus it is apparent that whether or not appellant's demand is a "time claim", within the meaning of that phrase as used in Item 6, Assistant General Manager Hughes was the highest officer delegated by the Company to handle time claims and all other claims (if any) coming within the purview of Article 58, and that his decision dated September 5, 1950, was a

final decision by the highest officer designated to handle such time claims.

Appellant's attempt to confine the one-year limitation to time claims is completely unsupported, in view of the language of Item 6. The only mention of time claims in the item is in connection with the phrase "highest officer designated by the carrier". It is apparent that the entire phrase, "highest officer designated by the carrier *to handle time claims*", is not a limitation upon the powers of that officer, or the scope of his handling, but merely an identification of the particular officer who may make the final decision on behalf of the carrier. The judges of this Court, like the judges of the District Court, are well aware, and indeed may take judicial notice, of the fact that many types of claims are made by individuals against a large railroad company. These may and do include: (1) claims for damage to freight; (2) claims for overcharges, i.e., that the Company has collected more than the proper transportation charges; (3) claims for personal injury made by employees, passengers, and members of the public; (4) claims for additional wage payments; (5) claims for additional vacation allowances; (6) claims for infringement of patent rights; and, occasionally, (7) claims for trespass or infringement upon real property rights. Each of these several types of claims usually falls within the jurisdiction of a separate department, and is finally passed upon by an officer of that department duly delegated to perform that function. The obvious and necessary purpose of identifying the officer having final jurisdiction to pass upon time claims was to distinguish him from other officers of the Company having equally final jurisdiction with respect to the various other types of claims confronting the Company.

There is no support at all for the suggestion that the highest officer designated to handle time claims may not or cannot pass upon any other type of claim coming within the purview of Article 58. It is of particular significance that neither appellant, nor the officers of the Trainmen's Brotherhood who represented him in the handling up to and including the Assistant General Manager, had any question in their minds but that appellant's claim, whether or not it was a "time claim", was within the class of claims properly to be presented to, and finally passed upon by, the Assistant General Manager who rendered the decision of September 5, 1950.

Appellant suggests that there is no evidence to support the conclusion that Mr. Hughes, the Assistant General Manager, was the highest officer designated by the carrier to handle time claims, and asserts that the so-called "interpretation" in the concluding paragraph of the Eyler affidavit (R. 22) was "admittedly inadmissible". Appellees have never admitted that the Eyler "interpretation" was "inadmissible", as contended by appellant; at most, they have only agreed with the comment that the paragraph thereof reproduced at R. 22, which undertakes to describe the application of Item 6, might for the purposes of this case be regarded as surplusage, if such should be necessary in order to avoid any suggestion of a factual issue. However, appellees consider that this paragraph is nothing more than a statement of the correct and consistently observed application of the language in question, rather than an expression of opinion. The statement is certainly not incompetent, for Mr. Eyler is shown by the first and second paragraphs of his affidavit (R. 18) to be fully qualified to testify respecting this subject-matter.

Furthermore, appellant is in no position to challenge the Eyler statement at R. 22, because he has never undertaken to file any opposing affidavit, although afforded at least two opportunities to do so. Appellant is in the same position as the plaintiff-appellant in the *Gifford* case, *supra* (153 F.2d 209), in which this Court said, in language already quoted:

> "* * * By failing to avail himself of this opportunity, plaintiff in effect admitted the facts alleged in the affidavit supporting the motion for summary judgment and left the trial court no alternative. [Citing cases.] Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result. [Citation.]"

While the statement in the Eyler affidavit with respect to the correct application of Item 6 was both competent and material, it was not necessary to an interpretation of that item by the District Court. The language in question is plain, easily understood, and not at all ambiguous or uncertain, or of such technical character as to require the aid of expert evidence. In these circumstances, the interpretation to be given to the section, or any portion thereof, presents solely a question of law, to be decided by the trial court. 3 *Williston on Contracts,* Sect. 616: 53 *Amer. Juris.,* Sect. 266, and cases cited; *11 C.J.S., Contracts",* Sect. 616; *Kress v. Fisher,* 65 F.2d 682, 683 (C.A. 4, 1933); *U. S. v. Lundstrom,* 139 F.2d 792, 795 (C.A. 9, 1943); *Moore v. Scott, etc., Co.,* 178 F.2d 3, 5 (C.A. 2, 1949); *Tobin Quarries v. Central Nebraska District,* 64 F. Supp. 200, 210-211

(U.S.D.C., Nebr., 1946; affirmed, 157 F.2d 483), and cases cited.

In this section of his argument (his brief, pp. 13-14) appellant also asserts that the District Court erred in failing to make findings of fact and conclusions of law in connection with the summary judgment herein, and cites *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.,* 181 F.2d 341 (C.A. 5, 1950). The general rule has long been recognized that the Court need not make findings of fact and conclusions of law where summary judgment is rendered under Rule 56; although of course the court *may* do so, *at its option,* or if requested. *Lindsey v. Leavy,* 149 F.2d 899 (C.A. 9, 1945); *United States v. Board of Com'rs,* 53 F. Supp. 395 (D.C. Wyo., 1943); *Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co.,* 2 F.R.D. 355 (D.C. Ky., 1942); *Dulansky v. Iowa-Illinois Gas & Elec. Co.,* 191 F.2d 881 (C.A. 8, 1951); *Simpson Bros. v. District of Columbia,* 179 F.2d 430 (C.A. D.C., 1949); *Burnham Chemical Co. v. Borax Consolidated,* 170 F.2d 569 (C.A. 9, 1948). Indeed, Rule 52(a) of the Rules of Civil Procedure was amended in 1946 to include the following specific provision:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or *56* or any other motion except as provided in Rule 41(b)."

It is true that the *Winter Park* case, *supra,* appears to present an exception to the general rule: but a study of the opinion indicates that the Court was confronted with a special situation, involving a series of rather complicated questions. The opinion recites six such questions, as to which, as the Court said, a satisfactory solution of the case necessarily involved the drawing of factual deductions. In the case at bar, no corresponding situation is shown. In-

stead, as appellant correctly indicates (brief, pp. 13-14) here there is "no material dispute" as to the actuality of the facts; and appellant does not contend, or even seriously suggest, that inconsistent hypotheses might reasonably be drawn from the unchallenged facts. It follows that the District ourt did not err in following the general rule.

This Court should conclude that it was unnecessary for the District Court to determine, and it did not undertake to determine, whether the appellant's claim here in suit was or was not a "time claim"; and further, that if such determination was in any respect material to the disposition of this cause by summary judgment, the District Court was competent to make such determination as a matter of law, no factual question being involved.

B. In the circumstances here disclosed, the District Court did not commit prejudicial error in granting appellees' second motion for summary judgment, notwithstanding that their earlier motion had been denied.

1. THE GRANTING OF THE SECOND MOTION WAS NOT BARRED BY THE FACT THAT THE EARLIER MOTION HAD BEEN DENIED.

An order denying a motion for summary judgment is interlocutory in character, and not *res judicata*. *Fraser v. Doing*, 130 F.2d 617 (1942); *Kliaguine v. Jerome*, 91 F. Supp. 809 (D.C.E.D.N.Y., 1950), 6 *Moore's Federal Practice, 2nd Ed.*, 2099. The District Court had power, at any time prior to entry of final judgment, to reconsider any action previously taken, and to reopen any part of the case. *Marconi Wireless Co. v. U. S.*, 320 U.S. 1, 47 (1942); *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 88 (1921).

The cases cited by appellant (his brief, p. 9) do not deal with the question whether a District Court has power to reconsider its prior interlocutory ruling. In *Collord v. Reconstruction Finance Corp.*, 103 F. Supp. 794 (U.S.D.C.W.D.

Pa., 1952), the question was as to the effect of the denial of a prior motion to dismiss upon a subsequent motion for summary judgment. The Court held that it would not exercise its *discretionary* power to re-examine the earlier ruling; saying (at p. 795):

> "However, this difference (between the tests on motion to dismiss and on motion for summary judgment) neither authorizes nor requires a re-examination of Judge Marsh's decision."

It is apparent that in the *Collord* case no good reason was shown to warrant reconsideration; whereas, in the instant case the District Court was faced with an intervening controlling decision, clearly opposed in principle to the earlier ruling.

Similarly, in *Garden City Chamber of Commerce, Inc. v. Wagner*, 104 F. Supp. 235 (U.S.D.C.E.D.N.Y., 1952), the Court said (p. 236):

> "The law of the case has been settled *and no occasion is presented for going over the same ground a second time.*"

Here the "law of the case" (if the earlier ruling be so regarded) was not "settled" until the *Barker* decision, rendered after the first ruling was made, and was then settled in a manner wholly inconsistent with that ruling.

The District Court has broad discretion with respect to motions for summary judgment. In 6 *Moore's Federal Practice, 2nd Ed.*, at page 2045, it is said that a trial court, "*when it has denied an earlier motion, may permit a subsequent motion where good cause is shown in support of the renewed motion.*" At page 2099, the same authority states further:

> "And if good reason is shown why the prior ruling is no longer applicable or for some other reason should

> be departed from, the court can and should entertain a renewed motion for summary judgment in the interest of effective judicial administration."

In the present case the "good reason" why the "prior ruling should be departed from" was afforded by this Court's intervening decision in the *Barker* case. While that decision did not "change the law" applicable to cases of this type, and was not held by the District Court to have done so (as appellant seems to believe: his brief, p. 10), it obviously operated to clarify the law in this circuit, and in particular to provide a controlling statement of the essential principle, which the District Courts were bound to follow. Since *Barker* was clearly inconsistent with the prior ruling in the present case, there was not only "good reason", but in fact the best of reasons, why the motion should be renewed so that the prior ruling might be corrected.

The *Barker* decision was indeed the first appellate decision by any Court, in which the principle enunciated by the Supreme Court in the *Koppal* case, (*Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653) was considered and applied. Prior to *Barker,* there had been a number of lower court decisions, including that of the Court of Appeals in the *Koppal* case (119 F.2d 117, C.A. 8, 1952) in which a contrary rule had prevailed; e.g., *Moore v. Illinois Central R. Co.,* 180 Miss. 276, 176 So. 593, 24 F. Supp. 731, 112 F.2d 959, 136 F.2d 412; *Texas & N. O. R. Co. v. McComb,* 143 Tex. 257, 183 S.W. 2d 716. The *Moore* case had been often cited in support of the contention that even though the employment contract conforms to the policy of the Railway Labor Act, in providing a procedure for handling grievances, an employee need not comply with the procedure in the contract if he elects to sue upon the contract in court. This misconception was eliminated by

the Supreme Court in the *Koppal* case. Thereafter, this Court, in the *Barker* case, held that the law of California requires that a dismissed employee, who sues in this state upon a collective bargaining contract, must show that he has complied with the contract provisions relating to the handling of his claim.

In this state of the case, it was not only appropriate that appellees should renew their motion for summary judgment; in a broad sense, it was their obligation to do so. If they had failed, they and their counsel might properly have been criticized for allowing a case to remain on the trial calendar, and perhaps go to actual trial, when clearly that case could and should be disposed of by summary procedure. In any event, it is certain that the District Court did not lack judicial power to reconsider and correct its prior ruling, and that in so doing, it did not exceed the bounds of judicial discretion. In fact, the District Court was in duty bound to recognize the principle then recently declared by this Court in *Barker,* and to render summary judgment for appellees accordingly.

2. EVEN ASSUMING, FOR THE SAKE OF ARGUMENT, THAT THE BETTER PRACTICE WOULD HAVE BEEN TO HAVE DENIED APPELLEES' SECOND MOTION, IT IS NEVERTHELESS APPARENT THAT THE GRANTING OF SAID MOTION WAS, AT MOST, HARMLESS ERROR.

Although, as above indicated, appellant asserts as one of his principal specifications of error that the District Court should not have considered or granted appellees' second motion for summary judgment, and argues at length in support of that general proposition (brief, pp. 8-10), he nowhere asserts or shows that the alleged error actually operated to his prejudice. In fact, the so-called error was completely harmless, since it did not result in any disposition of the case other than would have occurred if the

motion had been denied. It follows that the supposed error affords no ground for the reversal of the judgment.

It has been shown, both in the foregoing discussion and by reference to appellant's brief (pp. 12-13), that there is no substantial dispute as to the essential facts bearing upon appellant's ability to maintain this action. Appellant has admitted that his claim of wrongful discharge and consequent damages was handled by his representatives in accordance with Article 58, and apparently concedes that it was properly so handled. Indeed, appellant must agree that his claim or grievance was within the provisions of Article 58, and properly handled thereunder, if he is to assert any cause of action at all. The *Barker* decision, and the numerous other cases above cited, are ample authority to support this conclusion.

As establishing further the lack of any conflict or dispute as to the facts, it may be noted that none of the statements in the Eyler affidavit have ever been challenged by appellant; nor has he ever suggested that any additional facts bearing upon the handling of his claim could or should be brought to the attention of the Court.

The situation is thus that if the second motion had been denied, and the case had thereafter gone to trial, appellant could not possibly have shown that he had complied with the one-year limitation. He could only have contended, as he now does in his brief (at pp. 7-8), that because of certain language in Item 6 of Article 58, the one-year limitation was not applicable to his particular claim. That contention would not present a question of fact, but solely and simply a question of law: i.e., what shall be the construction given to the plain and unambiguous language of the contract provision in question? It is noteworthy that appellant has cited no authorities to support his position that the inter-

pretation and application of this simple agreement provision presents a question of fact. As we have shown, the uniform current of the controlling authorities is to the contrary: compare the decision in the *Tobin Quarries* case, *supra* (64 F. Supp. 200), and the authorities cited at pp. 210-211 of that opinion.

In these circumstances, there being no dispute as to any material fact, and a recent controlling decision by this Court upon the substantive legal issue presented, how can it be reasonably argued that appellant has suffered prejudice because summary judgment was rendered against him under Rule 56? If the case had gone to trial, appellant's own evidence in chief would have unavoidably developed exactly the same facts in respect to the nature of his claim, the handling thereof under Article 58, and the date and content of the final decision of the Company's highest officer, which were before the Court when the motion for summary judgment was granted. His evidence would also develop his failure to bring his action within one year from the date of that final decision. The position of the parties would thus be the same as when the second motion was granted. In the light of the *Barker* case, the trial court would have been bound to grant a motion either to dismiss under Rule 41(b), or for a directed verdict under Rule 50(a), whichever was appropriate; and judgment in favor of appellees would have followed accordingly.

It should also be noted that if appellant is correct in his contention that the one-year limitation, provided in Item 6, does not apply to his action, he must equally agree that the intermediate handling of his claim with the Company's officers, which led up to the final decision of September 5, 1950, did not operate to toll the statute of limitations otherwise applicable to his cause of action. Appellant was

in fact dismissed from the Company's service by letter dated December 2, 1949 (R. 23), which he acknowledged in writing on December 3, 1949 (R. 24). In his reply appellant admitted that he had been advised that he was "dismissed from the service of the Southern Pacific Co." Lest there be any doubt on the matter, both of the Local Chairmen who represented appellant also considered that he had been dismissed on December 2, 1949 (see their successive letters dated December 3, 1949, R. 23-24, and April 19, 1950, R. 24-25). This was also the opinion of the General Chairman of appellant's organization. By letter dated May 24, 1950 (R. 27), the General Chairman referred to appellant's "dismissal from the service, December 2, 1949, for alleged violation of Rule G."

Unless appellant's claim was properly within the scope of Article 58, including Item 6, it was subject to the provisions of the California statute of limitations applicable to an action founded upon a contract in writing. Sections 335 and 337 of the California Code of Civil Procedure provide that the period for the commencement of such an action shall be four years. In this case the four-year period started to run on December 3, 1949, and expired on December 2, 1953; whereas appellant's suit was not brought until December 22, 1953.

It is submitted that appellant is in no position to assert prejudicial error, because the District Court rendered the same decision, upon motion for summary judgment, which that Court would have been in duty bound to render upon appropriate motion based upon the same undisputed facts, in the event the case had been permitted to go to trial.

CONCLUSION

This appeal is in fact nothing more than an attempt to employ highly technical arguments in order to avoid the application of the principle conclusively established by the *Koppal* and *Barker* decisions.

It is significant that since 1950, there have been at least eight cases, seven in the District Courts of this Circuit and one in the California Superior Court, in which the essential question was the same as in the case at bar. Six of these cases were disposed of by summary judgments for the defendants. Two went to trial, and upon the facts the same results were reached. Decisions in other circuits and other jurisdictions have followed the same principle. The consistent course of the decisions in both the trial courts and the appellate courts establishes that the appellants' arguments in this case are untenable, and that the summary judgment entered herein was the proper disposition of the case. No useful purpose would be served by permitting the case to go to trial for, upon the undisputed facts, it is clear that appellant cannot recover, as a matter of law.

It follows that the judgment appealed from should be affirmed.

Respectfully submitted,

Burton Mason,
W. A. Gregory,
Attorneys for Appellees.

Dated at San Francisco, June 28, 1955.

No. 14,670

IN THE

United States Court of Appeals

For the Ninth Circuit

NORMAN BREELAND,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
and E. D. MOODY,

Appellees.

APPELLANT'S REPLY BRIEF.

THOMAS C. PERKINS,
801-9th Street, Sacramento, California,
Attorney for Appellant.

FILE
AUG -5 195
PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Statement of the case 1

Questions presented 3

Argument 4

I. The one year provision of Item 6 of Section (c) of Article 58 of the collective bargaining agreement was not a procedural step for adjusting grievances within the scope of the agreement 5

II. The District Court perforce determined appellant's claim to be a time claim within the provisions of the agreement. Such determination was necessary to apply the one year limitation to appellant's claim 7

III. The decision in the Barker case did not change the law as it existed at the time the first motion for summary judgment was denied 8

IV. The granting of summary judgment herein was not harmless error 9

Conclusion 10

Table of Authorities Cited

Cases

Pages

Barker v. Southern Pac. Co., 214 F. 2d 918 .... 2, 4, 5, 6, 9

Buberl v. Southern Pac. Co., 94 F. Supp. 11 .... 2, 4, 5, 6

Cone v. Union Oil Co., 129 A.C.A. 648, 277 P. 2d 464 5

Gifford v. Travelers Protective Ass'n., 153 F. 2d 209 7

Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 .... 2, 4, 5, 9

Wallace v. Southern Pac. Co., 106 F. Supp. 742 .... 2, 4, 5, 6

Codes

California Code of Civil Procedure:

Section 335 10

Section 337 .... 1, 10

Section 337(1) 2

No. 14,670

IN THE

United States Court of Appeals
For the Ninth Circuit

Norman Breeland,

Appellant,

vs.

Southern Pacific Company, and E. D. Moody,

Appellees.

APPELLANT'S REPLY BRIEF.

STATEMENT OF THE CASE.

The statement of the case as heretofore presented in briefs by appellant and appellees is substantially correct and no useful purpose could herein be served by a repetition thereof save to reply to a new issue raised by appellees in their statement of the case. At page 3 of their brief, appellees state that while summary judgment was based on the failure of appellant to comply with the agreement provisions, it also appears that the action is barred by the expiration of the four year limitation period of Section 337 of the California Code of Civil Procedure.

It is elementary that the statute of limitations does not begin to run until a cause of action accrues. Under the collective bargaining agreement at issue herein, a discharged employee had certain administrative steps to seek reinstatement including presenting his grievance to the superintendent and then to the general manager of the defendant carrier. As decided in *Wallace v. Southern Pac. Co.*, 106 F. Supp. 742; *Buberl v. Southern Pac. Co.*, 94 F. Supp. 11; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, and *Barker v. Southern Pac. Co.*, 214 F. 2d 918, these administrative steps must be taken as a condition precedent to recourse to the courts. It therefore follows that until an employee has taken these steps and been denied relief, he has no cause of action on which to bring a suit at law and no cause of action accrues until an adverse final decision by the general manager's office. In the case at bar, this occurred on September 5, 1950, when Mr. H. R. Hughes made his decision denying plaintiff reinstatement. The actionable breach occurred at this time when defendants refused plaintiff reinstatement and made his discharge final. Plaintiff commenced his action on December 22, 1953 (R. 3, 13, 22), three years, three and one-half months after the date of the actionable breach, which is within the four year limitation period imposed by Section 337(1) of the California Code of Civil Procedure.

QUESTIONS PRESENTED.

Appellees in their brief (pp. 4, 5) contend the "specific questions" herein at issue are not as stated by appellant in his brief (p. 4). The substitute questions proposed by appellees, however, affirmatively state in a light favorable to appellees what the disputed issues are. Question one avers that it affirmatively appears, and is not disputed, that appellant has wholly failed to comply with an express provision of the collective bargaining relative to maintaining an action for wrongful discharge. Appellant has vigorously contended that he has complied with all the so-called administrative requirements of his collective bargaining agreement prior to instituting his action at law. The purpose of this appeal, is to seek an appellate determination of the very issue which appellees assert as undisputed fact.

Question two affirmatively states that the provisions of the collective bargaining agreement are clear and unambiguous and the application thereof to the parties herein undisputed. Here again, appellant has contended and continues to contend that Article 58(c), Item (6) of the collective bargaining agreement has no application to appellant whose cause of action is one in law for damages for wrongful discharge and not a "time" claim within the purview of that section. Appellees have affirmatively stated as undisputed one of the major disputes herein.

Question three submitted by appellees asserts that in the intervening period between appellees' first and second motions for summary judgment a controlling decision was rendered by this Court. The "control-

ling decision" to which reference is made is *Barker v. Southern Pac. Co.,* 214 F. 2d 918, decided by District Judge Goodman subsequent to denial of appellees' first motion and a decision which in no way departs from the rules of law announced in *Wallace v. Southern Pac. Co.,* 106 F. Supp. 742; *Buberl v. Southern Pac. Co.,* 94 F. Supp. 11; *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653 and a host of other cases cited by appellees, the decisions of which were all rendered prior to appellees moving for summary judgment in the first instance. It is of interest to note that appellees are not consistent in their contention that the case, as a decision subsequent to the ruling on appellees' first motion for summary judgment, is controlling by reason of being new law on the subject matter herein. On page 9 and again at page 17 of their brief appellees state that there are numerous cases in the District Courts in this circuit in which the *same principles* have been applied (emphasis added). It appears as well, as contended by appellant, that if any doubt as to the principle set forth in the *Barker* case existed, "that doubt was set at rest by the decision of the Supreme Court in *Transcontinental & Western Air, Inc. v. Koppal,* 345 U.S. 653 (June 1, 1953)". (Appellees' Brief, page 13.) The *Koppal* case, supra, was decided prior to the first motion for summary judgment.

ARGUMENT.

Appellant has no argument with the general rule expressed in the cases of *Barker v. Southern Pac.*

Co., supra; *Buberl v. Southern Pac. Co.*, supra; *Transcontinental & Western Air, Inc. v. Koppal,* supra and others cited by appellees, that a party to a collective bargaining contract which provides grievance procedures for the settlement of disputes within the scope of such contract must exhaust these administrative or "interval" remedies before resorting to the courts.

In the cases cited by appellees, the failure of each plaintiff was to comply with a procedural step provided within the contract. In *Buberl v. Southern Pac. Co.*, supra, the plaintiff failed to appeal to the general manager. In *Wallace v. Southern Pac. Co.,* supra, the plaintiff failed to present a grievance within 60 days of dismissal. In *Barker v. Southern Pac. Co.,* supra, plaintiff failed to file a written notice for a hearing within ten days of dismissal. In *Cone v. Union Oil Co.,* 129 A.C.A. 648, 277 P. 2d 464, plaintiff completely neglected to initiate arbitration proceedings as provided by the contract. In each of the cases cited, the "administrative" or "procedural" or "internal" remedies for grievance provided for by the agreement itself for settling disputes within the scope of the agreement were not complied with.

I. THE ONE YEAR PROVISION OF ITEM 6 OF SECTION (c) OF ARTICLE 58 OF THE COLLECTIVE BARGAINING AGREEMENT WAS NOT A PROCEDURAL STEP FOR ADJUSTING GRIEVANCES WITHIN THE SCOPE OF THE AGREEMENT.

Appellees apparently concede that all the grievance steps provided by Article 58 of the agreement herein

were taken, commencing with presentation of the grievance or claim within ninety days of the date of occurrence through presentation of the claim to the superintendent within ninety days from the date of the notice declining the claim, notification to the superintendent of intention to appeal and finally presentation within one year to the highest general officer of the carrier designated to handle such claims and cases. In short, all the administrative remedies provided by the employment contract had been exhausted. All the provisions for the "internal" handling of appellant's claim had been complied with. After adverse decision by the highest general officer designated to handle such claims and cases, there was no provision for any further appeals to any higher person within the carrier organization.

The one year limitation provided by Item (6), Section (c) of Article 58 (the non-applicability of which is argued hereinafter) is not a grievance remedy provided within the contract and the rulings of the *Barker, Wallace* and *Buberl* cases have no application herein. If the language of the one year period be applicable to appellant, and appellant contends it is not, the legal question is not one of exhaustion of contractual administrative remedies, as these have been complied with, but a question of whether or not a collective bargaining agreement can validly set up a limitation period for lawsuits brought for the breach of the agreement, where that period is one year as opposed to four years established by statute.

Appellant cites *Gifford v. Travelers Protective Ass'n.*, 153 F. 2d 209 as authority that a collective bargaining agreement may validly set forth a limitation period considerably shorter than that provided by statute for actions predicated upon breach of that contract. In the *Gifford* case supra, the court found that the trial court delayed its final judgment to give the plaintiff an opportunity to "plead by way of replication any pertinent facts in avoidance of the time limitation," and by plaintiff's failure to so do he admitted the facts alleged and left the trial court no alternative.

In the instant case, the trial court apparently held that the appellant had not exhausted his administrative remedies and therefore he was precluded from prosecuting his claim.

II. THE DISTRICT COURT PERFORCE DETERMINED APPELLANT'S CLAIM TO BE A TIME CLAIM WITHIN THE PROVISIONS OF THE AGREEMENT. SUCH DETERMINATION WAS NECESSARY TO APPLY THE ONE YEAR LIMITATION TO APPELLANT'S CLAIM.

Appellees argue that the language of Item (6) Section (c), Article 58 clearly designates that a one year limitation period applies to *all* claims, grievances or cases arising under the collective bargaining agreement and that the phraseology of "highest officer designated by the carrier *to handle time claims*" merely identifies the officer who is empowered to make a final decision in all cases, irrespective of the type of claim, grievance or case that it may be. Appellees ask this court to take judicial notice that

there are many types of claims by individuals against a large railroad, both by employees and non-employees (Appellees' Brief, page 22), and that each of these several types of claims falls within the jurisdiction of a separate department of the company wherein it "is finally passed upon by an officer of that department duly delegated to perform that function". Appellees further state the "obvious and necessary" purpose of identifying the officer having final jurisdiction to pass upon time claims was to distinguish him from other officers of the company having final jurisdiction over other types of claims against the company. (Appellees' Brief, page 22.) This is precisely what appellant contends and there appears to be a happy agreement on this point. The only logical reason for the wording of Item (6) is to designate in which department claims must be further litigated within a one year period and that department is the one which handles time claims and time claims are specifically the only claim on which proceedings must be instituted within one year.

III. THE DECISION IN THE BARKER CASE DID NOT CHANGE THE LAW AS IT EXISTED AT THE TIME THE FIRST MOTION FOR SUMMARY JUDGMENT WAS DENIED.

Appellees contend the denial of the first motion did not bar a second motion on the same grounds, apparently on the basis that a good cause was shown why the prior ruling was not applicable. The good reason is averred to be the Barker decision, which appellees initially contend was clearly opposed in principle to previous rulings (Appellees' Brief, page

27). Next appellees state the *Barker* case merely clarified existing law (Appellees' Brief, page 28). However, it is admitted the Barker decision merely enunciated the principle stated in the *Koppal* case (*Transcontinental & Western Air, Inc. v. Koppal,* supra) which was a Supreme Court decision rendered prior to the first motion for summary judgment.

It is respectfully urged, as it has been consistently urged by appellant, that the *Barker* case promulgated no new rules of law which had not been set forth prior to appellees' initial motion herein and therefore the denial of the motion worked as a bar to a second motion on identical grounds.

IV. THE GRANTING OF SUMMARY JUDGMENT HEREIN WAS NOT HARMLESS ERROR.

Appellees argument herein may be reduced to simple terms. Appellees contend they would have prevailed in any event, so what harm could possibly be shown by appellant who just happened to be erroneously counted out at the initial stage of the legal proceedings. With this self-assured position, appellant is unable to agree. Contrary to appellees assertions (Appellees' Brief, page 30) there is a substantial issue herein as to whether or not appellant comes within the limiting clause of the agreement which purports to refer only to time claims. If it does relate only to time claims as contended by appellant, appellant has every right to litigate his cause of action and a deprivation of that right could hardly be termed "harmless error".

The issue of the limitation period of four years provided by Sections 335 and 337 of the California Code of Civil Procedure has heretofore been treated under appellant's statement of the case. It is simply that appellant's cause of action at law did not accrue until September 5, 1950, when reinstatement was refused. The statute does not begin to run until a cause be actionable. Prior to the September date, by reason of his activity in pursuing his administrative remedies, appellant could not bring a suit at law, and the statutory limitation period obviously could not begin to run.

CONCLUSION.

It is sincerely urged that the fact alone that several recent actions for wrongful discharge have been disposed of by judgment for defendants, either by way of summary proceedings or trial, is not a good or legal reason for denying relief to appellant. The issue is whether or not appellant can legally proceed to trial.

It is respectfully submitted that the judgment appealed from should be reversed and the cause remanded for trial.

Dated, Sacramento, California,
July 25, 1955.

Thomas C. Perkins,
Attorney for Appellant.

No. 14,671

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GENEVIEVE PIERCE, CARRIE PIERCE MCCOY, ANNA PIERCE, RUTH CARMICHAEL, NEE URTON, MARCUS PETE, JR., AND ELIZABETH PETE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys,
Department of Justice,
Washington 25, D. C.

FILED

SEP - 1955

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement:	
1. Historical background of the Palm Springs Reservation	5
2. The administrative allotment of the reservation	6
3. The present litigation	10
4. The issues on the present appeal	13
Summary of argument	18
Argument:	
I. The district court had no jurisdiction to make declarations as to the Indians' rights to an accounting for income, the equalization of allotments, or the apportionment of tribal water	21
A. The Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts	21
B. The jurisdiction conferred by the 1894 Act is not unlimited	22
C. The 1894 Act conferred no jurisdiction to make a declaration as to plaintiffs' rights to the income from the lands included in their nonconflicting selections	27
D. The 1894 Act conferred no jurisdiction to determine plaintiffs' rights to an apportionment of water	29
E. The 1894 Act conferred no jurisdiction to make declarations as to plaintiffs' rights to the equalization of allotments	32
F. The assumption of jurisdiction has been injurious rather than beneficial to the Indians and hence cannot be sustained on a theory of construing the statute favorably to the Indians	33–34
II. Even assuming the existence of jurisdiction the district court erred in holding that plaintiffs were entitled to the income derived from the lands included in their nonconflicting allotment selections from the dates of their selections	36
III. Even assuming jurisdiction exists the court erred in holding that it was the duty of the Secretary of the Interior and the United States to apportion or allot the tribal water among the individual Indians	42
Conclusion	44

CITATIONS

Cases:

	Page
Aetna Life Ins. Co. v. *Haworth,* 300 U.S. 227	21
Allen v. *Grand Cent. Aircraft Co.,* 347 U.S. 535	33
Arenas v. *Preston,* 181 F.2d 62, certiorari denied, 340 U.S. 819	22, 27, 35, 36
Arenas v. *United States,* 197 F.2d 418	24, 29
Arenas v. *United States,* 322 U.S. 419	22, 25, 32
Ashwander v. *Valley Authority,* 297 U.S. 288	25
Burke v. *Southern Pacific R. R. Co.,* 234 U.S. 669	31
Commercial Casualty Ins. Co. v. *Fowles,* 154 F.2d 884	21
Deffeback v. *Hawke,* 115 U.S. 392	31
First Moon v. *White Tail,* 270 U.S. 243	24
First Nat. Bank of Decatur, Neb. v. *United States,* 59 F.2d 367	38, 39
Gerard v. *United States,* 167 F.2d 951	24
Kennedy v. *Public Works Administration,* 23 F.Supp. 771	24–25
Love v. *United States,* 108 F.2d 43, certiorari denied, 309 U.S. 673	22
Miller v. *United States,* 159 F.2d 997	40
Muskrat v. *United States,* 219 U.S. 346	25
Myers v. *Bethlehem Corp.,* 303 U.S. 41	33
Reynolds v. *United States,* 174 Fed. 212	24, 33
Sioux Tribe v. *United States,* 316 U.S. 317	31
Skelly Oil Co. v. *Phillips Co.,* 339 U.S. 667	21
Tee-Hit-Ton Indians v. *United States,* 348 U.S. 272	40
United States v. *Alexander,* 131 F.2d 359	31
United States v. *Arenas,* 158 F.2d 730, certiorari denied, 331 U.S. 842	28, 37, 41
United States v. *Eastman,* 118 F.2d 421, certiorari denied, 314 U.S. 635	24, 28
United States v. *Fairbanks,* 171 Fed. 337, affirmed 223 U.S. 215	29
United States v. *Whitmire,* 236 Fed. 474	38-39, 40
United States v. *Powers,* 305 U.S. 527	30, 32
United States v. *Preston,* 202 F.2d 740	22
United States v. *Reynolds,* 250 U.S. 104	37, 42
United States v. *United States Fidelity Co.,* 309 U.S. 506	29
United States v. *Whitmire,* 236 Fed. 474	38, 39, 40
Virginian Ry. v. *Federation,* 300 U.S. 515	26
West Pub. Co. v. *McColgan,* 138 F.2d 320	21
Winters v. *United States,* 207 U.S. 564	31

Statutes:

Act of August 7, 1882, 22 Stat. 341	40
Act of August 15, 1894, 28 Stat. 286, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U.S.C. sec. 345,	21, 22, 23, 24, 26, 27, 29, 32, 33, 36
Act of July 1, 1902, 32 Stat. 716	41

Statutes—Continued

Page

Act of May 29, 1908, 35 Stat. 444 31
Declaratory Judgment Act, 28 U.S.C. sec. 2201 21
General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855 31
Section 5, 25 U.S.C. Sec. 348 37
Section 7, 25 U.S.C. sec. 381 . . . . 32, 42
Mission Indian Act of January 12, 1891, 26 Stat. 712, as amended by the Act of March 2, 1917, 39 Stat. 969 . . . . 31, 36
Treaty of March 16, 1854, Article 6, 10 Stat. 1043 40

Miscellaneous:

Thompson on Real Property (Perm. Ed. 1940), Vol. 8, sec. 4581 38

In the United States Court of Appeals for the Ninth Circuit

No. 14,671

United States of America, appellant

v.

Genevieve Pierce, Carrie Pierce McCoy, Anna Pierce, Ruth Carmichael, Nee Urton, Marcus Pete, Jr., and Elizabeth Pete, appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's Order for Findings and Judgment (R. 107-115) is reported at 123 F. Supp. 554. Its findings of fact and conclusions of law appear in the record at pp. 126-143.

JURISDICTION

The jurisdiction of the district court was invoked under the Act of August 15, 1894, 28 Stat. 305, as amended, 25 U. S. C. sec. 345 (codified as to jurisdictional provisions in 28 U. S. C. sec. 1353), and the

Declaratory Judgment Act, 28 U. S. C. sec. 2201. The judgment appealed from was entered September 30, 1954 (R. 144-148). A motion to amend findings and judgment was filed October 8, 1954 (R. 149-154), and was acted upon on December 1, 1954 (R. 155-156). Notice of appeal was filed by the Government on December 14, 1954 (R. 156-157).[1] The jurisdiction of this Court rests on 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

Invoking the Act of August 15, 1894, as amended, and the Declaratory Judgment Act, plaintiff Indians sought an adjudication that they were entitled to trust patents for lands which they had selected as allotments, the Secretary of the Interior having issued trust patents to other Indians for portions of the lands plaintiffs had selected. They also sought declarations, *inter alia,* that they were entitled to the income from the lands they had selected and that they were entitled to an equalization of allotments and the apportionment of the tribal waters. The district court affirmed the action of the Secretary in the issuance of trust patents for those lands as to which there were conflicting selections. But, although the Secretary had neither received nor denied any requests from plaintiffs for the equalization of allotments, the apportionment of water or the payment of the income derived from those portions of their selections as to which there were no conflicts, the district court assumed jurisdiction to make declarations in these

[1] The Government also filed a notice of appeal on November 29, 1954, but that appeal was dismissed on the ground that it was prematurely filed while the motion to amend findings and judgment was pending (R. 264-265). See *Segundo* v. *United States,* 221 F. 2d 296 (C.A. 9, 1955).

matters. On this appeal the following questions are presented:

1. Whether the district court had jurisdiction to determine such collateral matters.

2. Whether, assuming the jurisdiction existed, the district court erred in holding that plaintiffs were entitled to the income from the lands included in their nonconflicting allotment selections from the dates of their selections rather than from the dates of the issuance of trust patents.

3. Whether, assuming that jurisdiction existed, the district court erred in holding that it was the duty of the Secretary of the Interior and of the United States now to apportion and allot the tribal waters among the individual Indians.

STATUTES INVOLVED

1. The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdic-

tion to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *.

2. The jurisdictional portions of the Act of August 15, 1894, are codified as follows in 28 U. S. C. sec. 1353:[2]

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.
>
> The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him. * * *.

3. The Declaratory Judgment Act, 28 U. S. C. sec. 2201, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

---

[2] For the sake of simplicity the Act of August 15, 1894, as amended, 25 U.S.C. sec. 345, and the jurisdictional provisions as codified in 28 U.S.C. sec. 1353, will be referred to in this brief as the "1894 Act."

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

This suit is a continuation of the litigation concerning the allotting of lands on the Agua Caliente Indian Reservation in Palm Springs, California. The background for the suit may be summarized as follows:

1. *Historical Background of the Palm Springs Reservation.*—The Secretary of the Interior refused to approve allotment selections made in 1927 by members of the Agua Caliente Band, and upon suit by 18 members of the band his action was upheld. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal., 1938), affirmed 108 F. 2d 876 (C. A. 9, 1940), certiorari denied because petition filed out of time, 311 U. S. 652 (1940). Thereupon, Lee Arenas, who had not been involved in the *St. Marie* litigation, filed an action to establish his right to an allotment. After the Supreme Court had reversed a summary judgment in favor of the United States (*Arenas* v. *United States,* 322 U. S. 419 (1944)), Lee Arenas was determined to be entitled to a trust patent allotment as selected by him in 1927. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945), affirmed as modified, 158 F. 2d 730 (C. A. 9, 1946), certiorari denied, 331 U. S. 842 (1947). At the same time it was held that the *St. Marie* litigation was *res adjudicata* as to the rights of its participants to allotments pursuant to their 1927 selections. *Hatchitt* v. *United States,* 158 F. 2d 754 (C. A. 9, 1946).

2. *The Administrative Allotment of the Reservation.* —On April 8, 1948, the Secretary of the Interior directed the Commissioner of Indian Affairs to proceed with the allotment of the Agua Caliente Reservation and, in so doing, to prepare two allotment schedules: the first to include Indians listed on the 1927 schedule who were not parties to the *St. Marie* litigation, and the second to include all other living, duly enrolled members of the band, including the *St. Marie* group (R. 126, 194-196). A special allotting agent was appointed on July 21, 1948, but no instructions were given to him until September 24, 1948 (R. 127, 208-211). These instructions, issued by the Commissioner of Indian Affairs and approved by the Secretary of the Interior, provided that the allotting agent should follow the directions issued by the Secretary in the preceding April and that the allotments should be in the same acreages as those on the 1927 schedule, i. e., an "A" selection of a two-acre town lot or business site, a "B" selection of five acres of irrigable land, and a "C" selection of 40 acres of so-called nonirrigable or grazing land (R. 127-128, 205, 210). The instructions also authorized the allotting agent to reserve from allotment certain cemetery sites and ten acres on which the famous hot springs are located, but cautioned him that he should exercise great care in reserving from allotment, as he had suggested, lands in Andreas Canyon (the source of the reservation water supply), Palm Canyon and other scenic areas (R. 128, 203-205, 209-210). Such areas, it was stated, should be reserved only if (1) they were clearly needed for tribal purposes, (2) there was sufficient land otherwise available to provide allotments for all eligibles, and (3) the tribal committee and a majority of the adult members of the tribe consented (R. 128,

209-210). The allotting agent was also authorized, for the purpose of equalizing allotments, to increase the amount of grazing land in any selection (R. 205-207, 210).

On or about November 5, 1948, the allotting agent gave notice to all members of the tribe that allotment selections should be filed and he made available to them the forms "Request for an Allotment Selection" which had been approved by the Secretary (R. 24-25, 28-34, 128). By December 15, 1948, he had received 46 allotment selections on the prescribed forms, these selections being in addition to eight selections taken from the 1927 schedule and automatically listed on Schedule No. 1 (R. 128, 212-213, 236).

Meanwhile, the attorneys (hereafter called the Preston group) who had represented Lee Arenas in his litigation, and who subsequently were awarded attorney fees and were granted a lien on the Indian's allotment to secure payment of their award,[3] had taken upon themselves, without any authorization from the Interior Department, the function of preparing allotment selections and a schedule of allotments for the reservation (R. 218-222).[4] On December 18, 1948, they filed with the allotting agent the selections of 41 members of the band, each selection being accompanied by a grant of a power of attorney, not approved by the Secretary, to

---

[3] See *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9, 1950), certiorari denied, 340 U.S. 819, and *United States* v. *Preston*, 202 F. 2d 740 (C.A. 9, 1953).

[4] These and other activities of the Preston group led to the filing of a suit in January, 1949 (*United States* v. *Oliver O. Clark, et al.*, Civil No. 9089-BH, S.D. Calif.), to enjoin them and associates from interfering with the administration of the reservation. A temporary injunction was issued and was continued by consent for approximately three years. The suit was dismissed on consent and without trial in February, 1953.

the Preston group (R. 129, 218-219). In addition, the Preston group forwarded to the Assistant Secretary of the Interior a schedule (referred to as the "Clark" schedule to distinguish it from official schedules) listing selections for the 41 members and additional members of the band (R. 4-6, 17-19, 75). Signed selections were not submitted in support of those additional selections listed in the Clark schedule and presumably they were arbitrary selections made by the attorneys without the approval or consent of the individual Indians (R. 41-43, 49-50, 52-55). This schedule purported to be approved by four of the five members of the tribal committee and by 17 of the adult members of the tribe (R. 220-221). Twenty-three of the Indians whose names appeared thereon had previously filed other selections with the allotting agent, and 19 of these 23 subsequently voluntarily ratified their original selections at the agency (R. 42, 43, 50-52, 219). The selections of 21 Indians made only through the Preston group were in conflict with the prior selections of 27 Indians who had filed their selections with the allotting agent in accordance with the instructions (R. 219-220). In addition, some of the selections on the Clark schedule included lands reserved from allotment, and some of the 40-acre grazing selections were for lands which had been classified as irrigable and subdivided into 5-acre tracts, thus being not available for selection as grazing lands (R. 202-203, 210, 228).

Those Indians who had filed selections through the Preston group which were in conflict with prior selections or in disregard of the land classifications were advised by the allotting agent that their selections were unacceptable and were given an opportunity to make other selections (R. 213). The plaintiffs in this action

elected to stand on their selections appearing on the Clark schedule (R. 222). During January, 1949, the allotting agent submitted to the Commissioner of Indian Affairs his Schedule No. 1, containing the eight selections which also appeared on the 1927 schedule, and Schedule No. 2, containing the selections for 46 Indians for whom there were no valid selections on the 1927 schedule (R. 211-217). These schedules, together with the Clark schedule, were considered by the Bureau of Indian Affairs and the Department of the Interior (R. 217-231). In February, 1949, the Department declined to approve the Clark schedule, approved Schedule No. 1 in its entirety, approved 19 selections on Schedule No. 2 which did not conflict with any selections on the Clark schedule, and held the remaining 27 selections in abeyance (R. 226-228). At the same time the Secretary approved reserves totalling approximately 2,590 acres, which had been listed on Schedule No. 2, including reserves in the canyons which the allotting agent had been cautioned he should not reserve from allotment unless the tribe consented (R. 214-215, 224-227). At this time the tribal committee had neither approved nor disapproved the reserves, but subsequently disapproved them (R. 224).

In acting on the various schedules, the Secretary directed the allotting agent to proceed with the completion of the allotment program by requiring that the 21 Indians on the Clark schedule whose selections were in conflict or otherwise objectionable show cause why their selections should not be rejected (R. 228-230). He also pointed out that the appraised values of the scheduled allotments ranged from $17,100.00 to $164,740.00 and instructed the agent that those living members with low value allotments should be permitted to make addi-

tional selections to raise the values of their allotments to a suggested range of from $100,000.00 to $110,000.00, but that such equalization should be deferred until all pending selections had been adjusted (R. 230-231).

In response to show cause orders the 21 Indians whose selections were objectionable urged through their attorneys, among other things, that the conflicts should be resolved by application of a rule giving priority to birth date rather than date of selection (R. 234). The suggestion was rejected and, when the allotting agent announced that he intended to proceed according to his instructions, these Indians in April, 1949, appealed to the Secretary (R. 233). In May, 1949, the allotting agent resubmitted Schedule No. 2 with the recommendation that the remaining 27 selections be approved and submitted a new Schedule No. 3 containing selections for the 21 Indians who had filed selections only through the Preston group (R. 232-241). In making up this latter schedule, the agent allowed any portions of their previous selections which were not objectionable and made lieu selections of lands as close in value as possible to the value of the rejected selections (R. 233). On February 1, 1950, the Secretary affirmed the action of the allotting agent in rejecting the 21 conflicting selections, approved the balance of the selections on Schedule No. 2, and ordered that the 21 Indians should either accept the selections made for them on Schedule No. 3 or make lieu selections (R. 26). Trust patents were issued for the approved selections (R. 129-132).

3. *The Present Litigation.*—The seven plaintiffs (Clemente Segundo, Carrie Pierce McCoy, Genevieve Pierce, Ruth Carmichael, nee Urton, Marcus Pete, Jr., Elizabeth Pete, and Anna Pierce) elected to stand on their selections made through the Preston group (R.

27), and on July 10, 1950, they instituted the present action on their own behalf and purportedly on behalf of all members of the band similarly situated, invoking the court's jurisdiction under the 1894 Act as amended and codified and the Declaratory Judgment Act (R. 3). The complaint sought an adjudication that the plaintiffs and other members of the band were entitled to trust patents for allotments as shown on the Clark schedule and to the income derived from such lands from the date their selections had been filed, and that any trust patents in conflict with the selections on the Clark schedule were null and void (R. 12-13, 39). In addition the complaint prayed for declarations (1) that the plaintiffs and other Indians were entitled to have the waters on the reservation apportioned in a reasonable manner for use on the allotted lands; (2) that they were entitled to have made in respect to every allotment a reasonable provision for easements for flood control channels, streets and utility lines; (3) that the orders withdrawing lands in Andreas Canyon and the Village Trailer Court from availability for selection were invalid; and (4) that the Secretary's order limiting selections for allotments to seven acres in Section 14 and to five acres in Section 22 was invalid (R. 13-15). The individual Indians who had received trust patents for the lands claimed by plaintiffs were made parties defendant and several of them filed answers (R. 34-36, 40-57).

In its answer the United States acknowledged that the district court had jurisdiction to determine the plaintiffs' rights to trust patents for the lands claimed by them but denied that they were so entitled insofar as the conflicting selections were concerned, and also denied that there was any jurisdiction to make decla-

rations as to the accounting for income, apportionment of water, equalization of allotments, etc. (R. 21-28, 75-76). In a pre-trial order the court ruled that it had jurisdiction under the 1894 Act to adjudicate all controversies between the Secretary and the Indians relating to their rights to an allotment, including jurisdiction to decree the precise nature and extent of all water rights appurtenant to allotments of tribal land (R. 77-78).

After trial the district court concluded that there was no basis for considering the suit to be a class action inasmuch as the seven plaintiffs could not represent the unjoined members of the band because of conflicting interests and, the membership being relatively small, all could be joined as parties (R. 143). The court also concluded that priority in selection was controlling in resolving conflicting claims to allotments and that the Secretary had not abused his discretion in restricting the acreage that could be selected in the developed portions of the reservation (R. 137-138, 139). Thus, the judgment below denied the claims of plaintiffs insofar as their selections were in conflict or in excess of the limitations as to quantities and affirmed the validity of the trust patents which had been issued to the individual defendants (R. 145, 147). The court also found and adjudged that the Secretary had adopted and was executing a comprehensive plan for easements for flood control, streets and public utilities and that he had not abused his discretion in granting or refusing to grant such easements (R. 133-134, 141-142, 145). And, because none of plaintiffs had selected allotments in any of the areas reserved from allotment, the court concluded that the validity of the withdrawal orders

should not be determined (R. 140). Three of plaintiffs (Genevieve Pierce, Carrie Pierce McCoy and Anna Pierce) appealed from the portions of the judgment above described, but, after they had decided either to accept the selections made for them by the allotting agent or to make lieu selections, their appeal was dismissed upon stipulation, thus concluding all disputes as to allotments as such and leaving for consideration only the Government's appeal from those parts of the judgment now to be discussed, relating to collateral issues.[5]

4. *The Issues on the Present Appeal.*—The portions of the allotments represented by the 2-acre and 5-acre selections of Carrie Pierce McCoy and Annie Pierce and the 5-acre selection of Genevieve Pierce were not objectionable in any way. However, trust patents had not been issued for these selections because it was the practice to issue but one trust patent covering the three types of selections (R. 165-166). Neither plaintiffs nor their attorneys up to the time of trial had made a written or even oral request that trust patents be issued for the nonconflicting selections (R. 166-167, 172). And although the matter of the payment of the income derived from the nonconflicting selections had been taken

---

[5] While this case was pending in the district court, the allotment selections of the other plaintiffs were adjusted as follows. Clemente Segundo appeared on both Schedule No. 2 and the Clark schedule. He elected to take his nonconflicting selection appearing on Schedule No. 2, and a trust patent was issued in February, 1950 (R. 129). He subsequently died and the action was dismissed as to him on January 24, 1952 (R. 37). Ruth Carmichael made lieu selections and a trust patent was issued therefor, but she refused to accept the trust patent (R. 133). Marcus Pete, Jr., and Elizabeth Pete also made lieu selections and accepted trust patents for such selections (R. 133). The court ordered that the trust patents for these three Indians be confirmed (R. 138-139, 147).

up orally and in writing with officials of the Department of Justice and orally with officials of the Department of the Interior, no written request was made to the Department of the Interior as was suggested to them (R. 173-174, 175-176, 192-193).[6] As to these nonconflicting selections, the court concluded that the equitable title had vested in plaintiffs as of the date of selection on December 18, 1948, and that plaintiffs were entitled to the income derived from such land from that time (R. 129, 135, 139-140). Hence, the judgment declared that the United States must account to these plaintiffs for such rental income from December 18, 1948, and retained jurisdiction to effectuate this portion of the judgment (R. 146, 147-148).

The instructions to the allotting agent referred to the necessity of equalizing the value of allotments by permitting Indians who had selected allotments of comparatively low value to make additional selections, but directed that such additional selections should be deferred until all pending selections were adjusted and primary allotments made (R. 205-206, 210, 230-231). At the trial officials of the Bureau of Indian Affairs testified that the equalization process was deferred pending the outcome of this litigation (R. 169-171, 174-175). There was no indication in the pleadings or evidence that plaintiffs or any other member of the band had made any specific "equalization" selections which had been denied. Nevertheless, the district court, as-

---

[6] Upon written request by plaintiffs after the trial was concluded trust patents were issued for the nonconflicting selections on March 23, 1954, prior to final submission of the case. The plaintiffs have themselves been collecting the rentals due and payable since that date, and the Government has paid over to Genevieve Pierce and Annie Pierce that portion of the rentals previously received which was attributable to the period beginning on March 23, 1954.

suming jurisdiction of the equalization issue, found and concluded that it was the duty of the Secretary of the Interior to conduct further allotment proceedings so that when the allotment and equalization process is completed each plaintiff will have been allotted land of as nearly equal value as practicable to the land allotted to each of the other members of the tribe (R. 135-136, 140). The judgment provided that plaintiffs could make additional selections from any lands available for allotment and that the United States should allot to each total lands of approximately equal value to the lands allotted to others (R. 146-147). Jurisdiction was reserved to effectuate this part of the judgment (R. 147-148).

The third issue arises from the fact that the principal sources of water for the reservation are Andreas Canyon and Tahquitz Canyon (R. 178, 245-246). At least since 1906 the Government has assisted the Indians in developing water for irrigation and has maintained two distribution systems for their use (R. 177-182; Plaintiffs' Original Exhibit No. 83, pp. 7-12). The Secretary of the Interior has not adopted any regulations with respect to the distribution of the water on the reservation (R. 164). Instead, since 1942 the actual distribution of water has been under the control of the tribal committee which has established schedules for the use of water (R. 177, 180, 182-183, 259). There have been no complaints from any of the Indians as to a shortage of water (R. 171-172). Surveys were made during 1949 by two water engineers (one employed by the Government and one employed by the Preston group) with respect to the development of an additional water supply for irrigation and do-

mestic purposes, the plan proposed by the government engineer being estimated to cost $500,000.00 (R. 242-254; Plaintiffs' Original Exhibit No. 70). But the Secretary has not adopted any plan for the transmission of such additional water from the sources where it may be developed (R. 183-184). The district court found and concluded that the Secretary was remiss in the performance of his duty imposed by Section 7 of the General Allotment Act of February 8, 1887, 25 U.S.C. sec. 381,[7] to allot water rights appurtenant to allotted lands, and that all members of the tribe, if practicable, should be joined as parties to any action for equitable apportionment of the water rights appurtenant to the allotted lands (R. 134, 142-143). The judgment declared that the right to a just share of the tribal waters is appurtenant to each allotment of tribal lands, and that plaintiffs are entitled to have apportioned and it is the duty of the United States to apportion the tribal waters in such manner as will secure for each plaintiff a just share of such waters (R. 145). Jurisdiction was reserved to effectuate the judgment in this respect (R. 147-148).

Jurisdiction was also retained for the purposes of determining the right of plaintiffs' attorneys to receive reimbursement for their expenses and compensa-

---

[7] That Section provides:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

tion for their services, fixing the amount, and securing payment of the same (R. 148). The attorneys for plaintiffs filed a motion alleging that the adjudication as to water rights and equalization of allotments affects every allotment and inures to the benefit of each member of the band and requesting (1) an order permitting each member of the tribe who received an allotment subsequent to those of Lee Arenas and Eleuteria Brown Arenas to be made parties; (2) an order permitting the attorneys to present the question as to their right to compensation for services rendered and expenses advanced for each of such allottees; and (3) an order amending the findings and judgment to permit consideration of the above questions (R. 150-151). The district court ordered that, if and when it shall become necessary for the court to take steps to effectuate any part of its judgment, plaintiffs may apply for an order permitting other members of the tribe to be made parties, and that the attorneys may present at an appropriate time their petitions for compensation for services rendered and for reimbursement for expenses advanced in this action (R. 155-156). In all other respects the motion was denied without prejudice to renewal (R. 156). In this connection it is to be noted that in December, 1951, the attorneys filed in the land records of Riverside County, California, a Notice of Pendency of Action, giving notice that the judgment to be entered in this action might affect virtually all of the lands on the reservation and that if judgment is for the plaintiffs, the attorneys might apply to the court for an equitable lien upon such lands for the value of legal services performed and costs incurred in the action and also for the value of legal services

previously performed for the Indians with respect to the allotment of their lands (R. 81, 87-92). Because of the filing of this notice of *lis pendens* it has been impossible to sell any of the lands covered by the notice without first obtaining a waiver from the attorneys (R. 95-106). A motion to quash the notice was filed in the instant case, but, although argued, the motion has not been acted upon (R. 79-81, 93-94).

More recently, on July 27, 1955, the attorneys filed a motion seeking joinder of all the Indians except Lee Arenas and Eleuteria Brown Arenas for the purpose of securing an award for compensation and expenses against each of them.

SUMMARY OF ARGUMENT

I

A. Since the Declaratory Judgment Act does not enlarge the jurisdiction of the Federal courts, the jurisdiction of the district court must be found in the 1894 Act or not at all.

B. There was no dispute between the Secretary and plaintiffs as to their right to trust patents for those portions of their selections as to which there were no conflicting selections. Therefore, it is the Government's contention that when the district court determined that plaintiffs were not entitled to those portions of their selections which had been denied by the Secretary because of conflicts, its jurisdiction under the 1894 Act was exhausted. For the jurisdiction conferred by the Act is not unlimited. It does not authorize the settlement of controversies concerning the allotment policy and the management of allotted lands. Nor does it authorize the adjudication of controversies in the abstract.

Rather, the jurisdictional prerequisite for any action under the Act is the existence of a specific allotment selection which has been *unlawfully denied* by the Secretary. Thus, inasmuch as the district court held that the Secretary had not unlawfully denied the conflicting selections and inasmuch as the Secretary had approved rather than denied the nonconflicting selections, there is no basis for the adjudication of such collateral issues as the right to income pending issuance of a patent, to equalization of allotments or to the apportionment of tribal water. For there was no controversy in these matters which in itself was justiciable under the 1894 Act. If, as plaintiffs asserted and the district court found, the Secretary failed or refused to perform his duties in these respects, the proper remedy, if any, would be an action in mandamus against the Secretary rather than the present suit.

C. Inasmuch as there was no controversy as to plaintiffs' rights to their nonconflicting selections, there could be no jurisidction to determine their collateral rights to the income from the lands included in such selections. Moreover, it is plain that there is no such jurisdiction because the judgment in this respect contemplates, contrary to the provisions of the Act, an eventual money judgment against the United States. In addition this issue could not be adjudicated in the absence of an indispensable party, the tribe itself, which also had a substantial claim to the beneficial ownership of the income.

D. The Declaratory Judgment Act was the sole basis for the court's assumption of jurisdiction to declare that plaintiffs were entitled to an apportionment of the tribal water. But that Act can not be the basis of

jurisdiction. And since there was no allegation or evidence that the Secretary had denied a request for a specific allocation of water, but only that the Secretary had failed to take any steps to apportion water rights, it is clear that if plaintiffs are entitled to any relief in the premises, the remedy is in a mandamus action. Moreover, since the policy of Congress has been not to "allot" water when allotting lands, the assumption of jurisdiction is erroneous as an invasion of the field of determination of questions of Indian land policy.

E. We agree that plaintiffs and the other members of the tribe have a right to equalization of allotments. But in the absence of a denial of specific "equalization" selections, there is no jurisdiction to adjudicate the question.

F. Inasmuch as the assumption of jurisdiction to adjudicate questions as to income, equalization of allotments and apportionment of water is in fact detrimental to the interests of the Indians, it cannot be sustained on a theory of construing the 1894 Act favorably to the Indians.

II

Even assuming the existence of jurisdiction to adjudicate the question as to the right to income, the court erred in concluding that plaintiffs rather than the tribe were entitled to the disputed income. The tribe's right to the income prior to the issuance of the individual trust patents is established by the provisions of the pertinent allotting statutes. And the cases relied upon by the district court are distinguishable because of differences in the allotting statutes there construed.

III

Section 7 of the General Allotment Act did not, as the district court held, impose any duty to "apportion" or "allot" the tribal water, the only duty being one of "distribution". Moreover, it is plain that the Secretary was not remiss in his duty whether it be considered one of "distribution" or "apportionment".

ARGUMENT

I

The District Court Had No Jurisdiction to Make Declarations as to the Indians' Rights to an Accounting for Income, the Equalization of Allotments, or the Apportionment of Tribal Water

A. *The Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts.*—Plaintiffs invoked the jurisdiction of the court below under the Declaratory Judgment Act (28 U.S.C. sec. 2201) as well as the 1894 Act (R. 3), and in holding that it had jurisdiction to declare that a right to a just share of tribal waters is appurtenant to an allotment of tribal land, the court relied solely upon the Declaratory Judgment Act (R. 77, 142). But it is now well settled that "the operation of the Declaratory Judgment Act is procedural only" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240 (1937)), and that by the Act "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671 (1950); *Commercial Casualty Ins. Co.* v. *Fowles,* 154 F. 2d 884, 885 (C.A. 9, 1946); *West Pub. Co.* v. *McColgan,* 138 F. 2d 320, 323-324 (C.A. 9, 1943). More specifically, the Act did not

extend the consent of the United States to be sued. *Love* v. *United States,* 108 F. 2d 43, 50 (C.A. 8, 1939), certiorari denied, 309 U.S. 673. It follows, therefore, that the jurisdiction of the court below must be found in the 1894 Act or not at all.

B. *The jurisdiction conferred by the 1894 Act is not unlimited.*—It is clear that the 1894 Act is a consent that the United States may be sued concerning an Indian's right to a particular allotment of land. *Arenas* v. *United States,* 322 U.S. 419, 430 (1944). This court has also construed the Act as a consent that in such a case the federal court may exercise its general equity powers and impress a lien upon the allotment to secure the payment of attorney fees. *Arenas* v. *Preston,* 181 F. 2d 62 (C.A. 9, 1950), certiorari denied, 340 U. S. 819; *United States* v. *Preston,* 202 F. 2d 740, 741 (C.A. 9, 1953). But even the attorney fee cases do not support the district court's conclusion (R. 77-78, 141-143) that under the 1894 Act it had jurisdiction to settle any and all controversies between the Secretary of the Interior and the Indians which in any way affected their allotments. As we shall now show, such a conclusion is not supported by the various decisions in the *Arenas* litigation and, indeed, is in conflict not only with other authorities closer in point but even with interpretations as to the scope of the statutory consent in this Court's and the Supreme Court's opinions relating to the Agua Caliente Reservation.

At the time the Indian plaintiffs instituted this action their situation with respect to their allotment selections was as follows: portions of their selections had been denied by the Secretary of the Interior because they were in conflict with the prior selections of other Indians or

were in excess of the acreage limitations as to lands classified as irrigable (R. 26). In place of those portions which had been denied, plaintiffs had been given the choice of either accepting selections made on their behalf by the special allotting agent or themselves making lieu selections (R. 26-27). They chose to stand on their selections which had been denied (R. 27). There was no dispute with the Secretary as to their entitlement to the other portions of their selections which were not objectionable in any way, but the issuance of trust patents covering such portions was held up pending completion of their selections so that one trust patent could be issued to each Indian (R. 165-166). The Government has always acknowledged that the district court had jurisdiction to determine whether or not plaintiffs were entitled to the selections which were rejected by the Secretary. But it is the Government's contention under the circumstances that when the district court determined that issue adverse to plaintiffs, its jurisdiction under the 1894 Act was exhausted and that it had no authority to adjudicate the other claims asserted by the plaintiffs. The primary basis for the Government's contention is that as to those claims there was no justiciable controversy between the Secretary and the Indians, in that the Secretary had not denied the nonconflicting portions of their selections and had not denied any request by plaintiffs for the payment of income, the apportionment of water, or the equalization of allotments. Plainly, the Government's contention should have been sustained.

The limited nature of the jurisdiction conferred by the 1894 Act is clear. For example, it confers no jurisdiction to determine questions of heirship in connection

with a claim to an allotment by an Indian as the heir of an allottee, since exclusive jurisdiction to determine heirship is vested in the Secretary of the Interior. *First Moon* v. *White Tail,* 270 U.S. 243 (1926); *Arenas* v. *United States,* 197 F. 2d 418 (C.A. 9, 1952). It has also been held that a jurisdictional prerequisite to judicial action under the Act is the existence of a specific allotment selection which has been improperly denied by the Secretary. *Reynolds* v. *United States,* 174 Fed. 212, 213-215 (C.A. 8, 1909). In other words, the Act does not permit the adjudication of assumed controversies *in vacuo.* And it does not authorize the settlement of controversies concerning the allotment policy and the management of allotted lands. *United States* v. *Eastman,* 118 F. 2d 421, 423 (C.A. 9, 1941), certiorari denied, 314 U.S. 635;[8] *Kennedy* v. *Public Works Administra-*

---

[8] In the *Eastman* case several allottees sued the United States and its officials to enjoin the enforcement of regulations concerning the sale of timber on their allotments. This Court held that the United States should have been dismissed as a party because the 1894 Act was "intended merely to authorize suits to compel the making of allotments in the first instance." 118 F. 2d at p. 423. In *Gerard* v. *United States,* 167 F. 2d 951, 954 (C.A. 9, 1948), this Court held that the Act also authorized suits to determine an Indian's right to an allotment for which he had been given a trust patent but which had been sold at a tax sale after the Secretary of the Interior had issued a fee patent without the Indian's consent. In so holding this Court stated: "* * * what we said in the Eastman case in connection with dismissing the United States is not controlling here." 167 F. 2d at p. 954. Obviously, this statement does not affect the further language in the *Eastman* case (118 F. 2d at p. 423) indicating that the 1894 Act should not be extended to authorize judicial review of every aspect of the administration of Indian lands and allotments. In other words, the *Gerard* case is not a holding that jurisdiction under the 1894 Act extends beyond the determination of an Indian's right to an allotment.

tion, 23 F. Supp. 771, 773-774 (W.D. N.Y. 1938). As the Supreme Court said in *Arenas* v. *United States,* 322 U.S. 419, 432 (1944), the Act requires the courts to "render a judgment which will stand in lieu of the Secretary's action if he has *unlawfully denied* a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy * * *." [Emphasis by the Court.]

Thus, it is clear that when the district court affirmed the Secretary's denial of the conflicting portions of plaintiffs' selections (R. 138, 145, 147), its jurisdiction ended. The exercise of further jurisdiction could not rest upon plaintiffs' claim to the conflicting selections since, as the court found, those selections had not been "*unlawfully denied.*" Neither could it rest upon the nonconflicting selections, for they had not been denied at all. And there is no other jurisdictional basis, for none of plaintiffs had made an "equalization" selection or a request for the payment of rental income or for a definite allocation of water upon which the Secretary could have acted. Indeed, a mere reading of those portions of the judgment dealing with these matters reveals that they are simply declarations of abstract rights. In this respect the judgment could not, as required by the 1894 Act, "have the same effect * * * as if such allotment had been allowed and approved" by the Secretary. Quite obviously, the Act does not permit such advance declarations of abstract and indefinite rights. *Muskrat* v. *United States,* 219 U.S. 346 (1911); *Ashwander* v. *Valley Authority,* 297 U.S. 288, 324-325 (1936).

The district court based its jurisdiction largely upon its conclusions that the Secretary had been remiss in his

duties to equalize allotments and apportion water (R. 134, 142-143). But even if such conclusions were correct,[9] it does not follow that the court could provide relief pursuant to the 1894 Act. For if the Secretary was refusing or failing to take action in the respects complained of, it is plain that the proper remedy was a mandamus action against the Secretary rather than the instant suit. *Virginian Ry.* v. *Federation,* 300 U.S. 515, 551 (1937). Indeed, the district court recognized that mandamus, not a suit under the 1894 Act, was the proper method to attack inaction by the Secretary when, in holding that plaintiffs could not rely upon selections allegedly made before the allotment procedure was established, it reasoned that mandamus was the proper remedy to compel action (R. 137). By the same reasoning, the court should have determined it had no jurisdiction beyond the determination of whether or not plaintiffs were entitled to trust patents for the lands as to which there were conflicting selections.

Because of limitations of the 1894 Act the district court had no jurisdiction to pass upon any of the matters of which the Government here complains. We shall now show that for detailed reasons applicable to the individual issues the district court had no jurisdiction to make declarations with respect to the rights of

---

[9] We submit that the "findings of fact" to this effect were erroneous. It is undisputed that the Secretary had outlined the procedure for equalization of allotments, but he had directed that the process of equalization should be deferred until the adjustment of the conflicting selections (R. 230-231). Such direction was not only reasonable but necessary, since it would be impossible to equalize until the basic allotments were stablized. We shall later demonstrate, *infra*, pp. 42-44, that the finding as to the apportionment of water was due to a misunderstanding as to the nature of the Secretary's duty.

the plaintiffs to an accounting for income, the apportionment of water, or the equalization of allotments.

C. *The 1894 Act conferred no jurisdiction to make a declaration as to plaintiffs' rights to the income from the lands included in their nonconflicting selections.*— The Secretary of the Interior has not denied those portions of plaintiffs' selections which were not in conflict with the selections of others but, rather, has approved them as they appeared on Schedule No. 3, the only official schedule containing plaintiffs' selections, subject only to the condition that plaintiffs voluntarily elect to accept them (R. 26). Even up to the time of trial plaintiffs had never requested the Secretary to issue trust patents for their nonconflicting selections (R. 166-167, 172). Hence, for the reasons we have already discussed (*supra*, pp. 22-26), it is clear that there was no controversy with respect to the nonconflicting selections which was justiciable under the 1894 Act. And that being so, it is likewise clear that there could be no jurisdiction with respect to plaintiffs' claims for the income from such nonconflicting selections. In other words, not even the broadest application of the concept that by the 1894 Act Congress intended the courts "to fully exercise their general equitable jurisdiction" (see *Arenas* v. *Preston*, 181 F. 2d 62, 67 (C. A. 9, 1950), certiorari denied 340 U. S. 819) is an aid to jurisdiction here, since there is not the basic jurisdiction to make any adjudication concerning the Indians' rights to the nonconflicting selections upon which their rights to income depend. And there can be no other basis for a conclusion that there is jurisdiction to make an adjudication as to the Indians' right to income. In addition to the fact that plaintiffs have not made a request for payment which the Secre-

tary could deny (R. 173-174, 175-176, 192-193), jurisdiction is also foreclosed in this respect by the fact that the question of who is entitled to the income is separate and distinct from the question whether an Indian is entitled to a particular allotment. The income question is more a matter of administration of the allotment, a question which is not submitted to the courts by the 1894 Act. Cf. *United States* v. *Eastman,* 118 F. 2d 421, 423 (C. A. 9, 1941), certiorari denied, 314 U. S. 635.

These reasons, we submit, clearly demonstrate that the district court lacked jurisdiction to make any adjudication as to plaintiffs' right to income from their nonconflicting selections. But we need not rest our case here. The judgment provides that plaintiffs are entitled to all the income derived from the lands included in their nonconflicting selections from the date on which their selections were filed, that the United States is required to account to plaintiffs for such income, and that jurisdiction was retained to effectuate the judgment in this respect. Obviously, this portion of the judgment contemplates an eventual money judgment against the United States or at least a statement of a balance due, which, in view of the sovereign immunity from execution, is the same thing as a money judgment against the United States. But, as this Court has already held, the 1894 Act does not authorize a money judgment against the Government. *United States* v. *Arenas,* 158 F. 2d 730, 753 (C. A. 9, 1946), certiorari denied, 331 U. S. 842.

Moreover, the United States did not assert any beneficial ownership of the income, but instead contended that it held the moneys in trust for either the tribe or the individual Indians and was willing to make pay-

ment to the rightful owner. Consequently since the claim of the tribe is, to say the least, a substantial one (see *infra*, pp. 36-42), it was an indispensable party to any adjudication of this issue. *Arenas* v. *United States*, 197 F. 2d 418, 420 (C. A. 9, 1952); *United States* v. *Fairbanks*, 171 Fed. 337, 338-339 (C. A. 8, 1909), affirmed 223 U. S. 215, 226 (1912). Since it was not and could not be made a party to the suit (*United States* v. *United States Fidelity Co.*, 309 U. S. 506, 512-513 (1940)), it is clear that for the lack of a necessary party, in addition to the other reasons already discussed, there was no jurisdiction to determine plaintiffs' right to the disputed income. And certainly the 1894 Act did not contemplate the interpleader of the Indian tribe of which the plaintiffs were members in order to settle its rights.

D. *The 1894 Act conferred no jurisdiction to determine plaintiffs' rights to an apportionment of water.*— The judgment declares in part that a right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, that it is the duty of the United States to apportion the waters upon the reservation in such manner as will secure for each plaintiff a just share of the tribal waters, and that jurisdiction is retained to effectuate the judgment in this respect (R. 145, 147). This portion of the judgment flowed from the court's conclusion that it had jurisdiction under the Declaratory Judgment Act to make such a declaration as to the right to water (R. 77, 142).[10]

---

[10] The district court also concluded that, whenever it appears that the Secretary has failed to perform his duty to prescribe rules and regulations for the distribution of water among the Indians, the court has jurisdiction under the 1894 Act "to adjudicate the resulting controversy between the Secretary and the allottees, by decreeing the precise nature and extent of all water rights ap-

But, as we have already shown (*supra*, pp. 21-22), the Declaratory Judgment Act can not be the basis for jurisdiction. And it is plain that under the circumstances jurisdiction was not conferred by the 1894 Act. The complaint contains no allegation and there was no evidence that the Secretary had denied a request by any of plaintiffs for an allocation of a specified amount of water. Rather the only allegation, and the court found and concluded that it was supported by the evidence, was that the Secretary was remiss in the performance of the duty imposed by law in that he had failed to allot water rights (R. 8, 134, 143). Obviously, the proper remedy for such alleged failure on the part of the Secretary was a mandamus action against the Secretary rather than a suit against the United States under the 1894 Act (*supra*, pp. 25-26). And the only appropriate judgment in such a mandamus suit would be a direction to the Secretary to act in the matter and not, as here, an undertaking by the court to do what it may think the Secretary should have done. While this reasoning by itself demonstrates the lack of jurisdiction, there are other reasons why it was error for the district court to assume jurisdiction to adjudicate water rights.

It is not disputed here that the water on the Agua Caliente Reservation is reserved and held in trust by the United States "for the equal benefit of tribal members." *United States* v. *Powers,* 305 U.S. 527, 532-

---

purtenant to and accompanying allotments of tribal land" (R. 142-143). And, having reserved jurisdiction to effectuate its judgment (R. 147), the court apparently intends to proceed in making such a decree if the Secretary fails to apportion the tribal waters to the satisfaction of the court. It follows that if the court had no jurisdiction to make the limited declarations it did, there would likewise be no jurisdiction to decree "the precise nature and extent of all water rights" on the reservation.

533 (1939); *Winters* v. *United States,* 207 U. S. 564, 576-577 (1908). "Being reserved no title to the waters could be acquired by anyone except as specified by Congress." *United States* v. *McIntire,* 101 F. 2d 650, 653 (C. A. 9, 1939); *United States* v. *Alexander,* 131 F. 2d 359, 360 (C. A. 9, 1942). For "since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe* v. *United States,* 316 U. S. 317, 326 (1942). But while directing the allotment of the "lands" on the Agua Caliente Reservation, Congress has never provided that the water resources of the reservation be "allotted." See Mission Indian Act of January 12, 1891, 26 Stat. 712, as amended by the Act of March 2, 1917, 39 Stat. 969, 976; General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855. And, since Congress has not specifically authorized it, the Secretary cannot even insert in the trust patent any provision respecting the Indian's right to the use of water. *Deffeback* v. *Hawke,* 115 U. S. 392, 406 (1885); *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 696-701 (1914).

Indeed, rather than authorizing any apportionment of water it is clear that Congress has adopted a policy of refraining from doing so until the establishment of an irrigation project and then restricting the attempt at allocation to such an indefinite amount as "a right to so much water as may be required to irrigate such lands." Act of May 29, 1908, 35 Stat. 444, 448-450; see *United States* v. *McIntire,* 101 F. 2d 650, 653-654 (C. A. 9, 1939). And, in the event that the supply of water

is insufficient to furnish the required amount, then the provisions of section 7 of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. sec. 381) become applicable and authorize the Secretary of the Interior to prescribe regulations to secure a "just and equal distribution" of the tribal water. *United States* v. *McIntire,* 101 F. 2d 650, 654 (C. A. 9, 1939). Thus, at every stage Congress has established procedures independent of the procedures for the allotment of lands, for the protection of the individual Indian's right to a fair and just share of the tribal water. Obviously, in assuming jurisdiction to apportion the tribal waters, the district court entered into the field of the determination of questions of Indian land policy. The 1894 Act conferred no such authority. *Arenas* v. *United States,* 322 U. S. 419, 432 (1944).[11] Finally, no proof is needed to establish the fact that water right litigation produces one of the most complicated and extended types of cases there are (see *infra,* pp. 35-36). It is absurd to suppose that Congress intended that a suit under the 1894 Act should develop into such a case.

E. *The 1894 Act conferred no jurisdiction to make declarations as to plaintiffs' rights to the equalization of allotments.*—The district court found that plaintiffs were entitled to total lands of approximately equal value to the lands allotted to each of the other members of the tribe, and that it was the Secretary's duty to conduct further allotment proceedings so that when the al-

---

[11] The assumption of jurisdiction to apportion tribal waters is not only erroneous but is wholly unnecessary for the protection of the right of the individual Indian to the use of a fair and just portion of the water. For even though his patent is silent as to his water rights, and even though his allotment is outside the area to be served by a reservation irrigation project, an Indian is nevertheless entitled to the use of a fair and just portion of the tribal water. *United States* v. *Powers,* 305 U.S. 527, 531-533 (1939).

lotment and equalization process is completed each plaintiff would have allotments as nearly equal in value as practicable to the value of the allotments of others (R. 135-136, 140). The judgment provided that plaintiffs were entitled to their just and equitable share of the tribal lands, that each was entitled to make further selections, and that the United States shall allot to each total lands of approximately equal value to the lands allotted to the other members of the tribe (R. 146-147).

We do not now and never did in any way dispute the right of the plaintiffs and all other members of the tribe to such equalization of allotments. But we do contend that the 1894 Act did not authorize the court to so intrude into the administrative functions. Under the allotting instructions the process of equalization was to be deferred until after the primary allotments had been stabilized (R. 230-231). And none of plaintiffs or any other members of the tribe had made a request for any specific land for equalization purposes, so that, of course, the Secretary had not denied any such request. Thus, any declaration by the court as to the right to equalization is made *in vacuo* and in the absence of any controversy. Such jurisdiction is not conferred by the 1894 Act. *Reynolds* v. *United States*, 174 Fed. 212 (C.A. 8, 1909); see *supra*, pp. 22-26.

Basically the error below is the same as that when review of an administrative ruling is undertaken before the administrative remedies have been exhausted. Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-52 (1938); *Allen* v. *Grant Cent. Aircraft Co.*, 347 U.S. 535, 553 (1954).

F. *The assumption of jurisdiction has been injurious rather than beneficial to the Indians and hence cannot be sustained on a theory of construing the statute fa-*

vorably to the Indians.—Only seven of the 76 or so members of the Agua Caliente Band joined as plaintiffs in this action, and of the seven several adjusted all their differences with the Government before the case went to trial. Apparently the great majority of the tribe was satisfied with the Secretary's management of the reservation with respect to the equalization of allotments and the apportionment of water. Indeed, 16 members were aligned with the United States as defendants because they had received trust patents for lands which were claimed by plaintiffs. The rights of these 16 Indians to their lands were confirmed by the judgment (R. 147). Yet, because of the assumption of jurisdiction to order the equalization of allotments and the apportionment of water, neither the successful Indian defendants nor the other members of the tribe have been able to enjoy fully the fruits of their trust patents. For, shortly after this suit was filed, the attorneys for plaintiffs filed a notice of *lis pendens,* asserting that, if plaintiffs were successful, the attorneys might apply for an equitable lien upon virtually all of the lands of the reservation for the value of legal services performed and costs incurred in this action and also for the value of legal services previously performed for the Indians (R. 87-91). After judgment was entered, the attorneys filed a motion, which was granted in part (R. 155-156; see *supra,* p. 17), alleging that the adjudication as to water rights and the equalization of allotments affects every allotment and inures to the benefit of each allottee, and requesting an order permitting each member to be made a party so that the attorneys could present the question as to the right to

compensation against each Indian (R. 149-151).[12] Ever since the filing of the notice of *lis pendens,* title insurance companies have refused to issue certificates of title and it has been impossible to sell any of the allotted lands without first obtaining a waiver from the attorneys (R. 95-106). The waiver, of course, is not given until the making of a satisfactory escrow agreement for the benefit of the attorneys. Clearly, the 1894 Act did not intend to confer jurisdiction that would so interfere with the management of allotted lands and place successful defendants and other Indians who did not favor the litigation at the mercy of the attorneys. Cf. *Arenas* v. *Preston,* 181 F. 2d 62, 66 (C.A. 9, 1950), certiorari denied, 340 U.S. 819.

And unless the assumption of jurisdiction to equalize allotments and to apportion water is declared to be invalid, it will be a long time before the resulting cloud is removed from the titles of the Indians. This is particularly so with respect to the apportionment of water. Before there can be any allocation of a specific amount of water to each member of the tribe, it must be first ascertained what are the total water rights of the tribe. It is well known that suits to establish water rights are generally long drawn out and expensive. And apparently this one would not be an exception to the rule. Since the Agua Caliente Reservation is checkerboarded (R. 127), it will probably be necessary to bring in the owners of the alternate sections as well as those whites who have purchased Indian lands. Indeed, it will

[12] On July 27, 1955, the attorneys filed a motion in the district court seeking an award of fees against every allottee except Lee Arenas and Eleuteria Brown Arenas.

doubtless be necessary to bring in as parties the owners of lands far from the Palm Springs area who have an interest in the underground waters (Plaintiffs' Original Exhibit No. 70, pp. 7, 21). Clearly, the 1894 Act was not intended to confer jurisdiction for litigation of such scope. And if there could be any doubt on that score, it should be resolved in favor of the Indians, the beneficiaries of the Act, by determining that any such suit was beyond the scope of the jurisdiction conferred. Cf. *Arenas* v. *Preston,* 181 F. 2d 62, 66 (C.A. 9, 1950), certiorari denied, 340 U.S. 819.

II

Even Assuming the Existence of Jurisdiction the District Court Erred in Holding That Plaintiffs Were Entitled to the Income Derived from the Lands Included in Their Nonconflicting Allotment Selections from the Dates of Their Selections

The Mission Indian Act of January 12, 1891, 26 Stat. 712, under which the allotment of the Agua Caliente Reservation has been proceeding, contemplated that in the beginning trust patents would be issued to each of the various bands of Mission Indians for their tribal reservations and that at some time in the future the lands would be allotted in severalty and trust patents would be issued to the individual Indians. With respect to the individual trust patents section 5 of the Act provides:

> * * * That these patents, *when issued,* shall override the patent authorized to be issued to the band or village as aforesaid, and *shall separate the individual allotment from the lands held in common,* which proviso shall be incorporated in each of the village patents. [Emphasis added.]

In addition section 8 of the Act provides:

> * * * *Subsequent to the issuance* of any tribal patent, or *of any individual trust patent* as provided in section five of this act, any citizen of the United States, firm, or corporation *may contract with the* tribe, band, or *individual* for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose. [Emphasis added.]

It is plain, therefore, that in view of the quoted statutory provisions the allotting instructions quite properly provided that the trust patents to be issued to those Indians, such as plaintiffs here, who could not rely upon selections made in 1927 "shall be effective as of the date of the issuance thereof" (R. 196).[13] It is

---

[13] In *United States* v. *Arenas,* 158 F. 2d 730, 750, 753 (C.A. 9, 1946), certiorari denied, 331 U.S. 842, this Court held that Lee Arenas was entitled to a trust patent to be effective as of May 9, 1927, the date of his selection. A trust patent was issued to Lee Arenas to conform to the judgment, and the Secretary instructed that the trust patents of all those Indians whose selections appeared on the 1927 schedule, except those foreclosed by the *St. Marie* litigation, should likewise be effective as of May 9, 1927 (R. 195). In *United States* v. *Reynolds,* 250 U.S. 104, 109 (1919), the Supreme Court held that in allotments made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. sec. 348, "the trust period begins and dates from the issuance of the trust patent and not from the approval of the allotment." And, it should be noted, the date of the patent in the *Arenas* case was important only in regard to commencement of the trust period. It had no bearing upon income from the property.

also plain that the tribe must have retained some measure of ownership and control of the lands until the issuance of the individual trust patents. For it was the issuance of the individual trust patent, rather than the filing of a selection, which served to "separate the individual allotment from the lands held in common," and until the issuance of an individual trust patent it was the tribe, rather than the individual, that was authorized to make contracts regarding the lands. Thus, until the actual issuance of the individual trust patent, the United States held the lands in trust for the tribe and must also be considered as holding the income from such lands for the same purpose. Hence no matter what equitable rights the individual allottee may have acquired by the virtue of a valid selection, the tribe was entitled to the beneficial use of and income from the lands until the issuance of the individual patent, just as the ordinary vendor under a contract for sale, title to pass at time of conveyance, would be entitled to the beneficial use and income until the legal title passed. See Thompson on Real Property (Perm. Ed. 1940), vol. 8, sec. 4581, p. 527. It is submitted, therefore, that plaintiffs are not entitled to the income derived from their nonconflicting selections during the period between the date of selection and the date on which the trust patent issued.

In reaching a contrary conclusion the district court reasoned (R. 139-140) that equitable title to their nonconflicting allotment selections vested in plaintiffs as of the date of their selections (citing *First Nat. Bank of Decatur, Neb.* v. *United States,* 59 F. 2d 367 (C.A. 8, 1932)) and that, since the issuance of a trust patent is merely a ministerial act (citing *United States* v.

Whitmire, 236 Fed. 474, 480 (C.A. 8, 1916)), plaintiffs are entitled to all the income from such lands from the time of selection. But as we have shown, *supra,* p. 38, the right to income does not follow the equitable title, so that the court's conclusion can not be supported by its premises. Moreover, the conclusion can be reached only by ignoring the fact that the tribe also had equitable rights in the same lands and that the tribe's rights were not to be considered as extinguished until the issuance of the individual trust patents (*supra,* pp. 36-38).

That the tribe's rights in any part of the reservation continued until the issuance of an individual trust patent is, we have shown (*supra,* pp. 36-38), clearly established by the statutory authority for the allotment of the Agua Caliente Reservation. And, inasmuch as allotment statutes have almost limitless variations as to the nature of the rights established, it is clearly erroneous to ignore the pertinent statute and to draw analogies from cases decided under dissimilar allotment statutes, as the court below did (R. 139-140), in determining such an unusual question as the right to income from allotted lands prior to the issuance of trust patents.[14] That this is so becomes apparent from an examination of the cases relied upon by the district court.

In *First Nat. Bank of Decatur, Neb.* v. *United States,* 59 F. 2d 367, 369 (C.A. 8, 1932), it was stated: "Title to the land which defendant confessedly owns was initiated when the individual Indian made selection of and filed upon his allotment of land. That was the in-

[14] In their brief filed in the trial court on March 31, 1954, plaintiffs acknowledged that their research had disclosed no case directly in point. We also have been unable to find a case directly in point.

ception of the title of the Indian allottee, and when the patent was issued it related back to the inception of the title and no further." We have no quarrel with the statement as applied to the allotment of the reservation of the Omaha Indians, which was accomplished under the provisions of Article 6 of the Treaty of March 16, 1854, 10 Stat. 1043, 1044, and the Act of August 7, 1882, 22 Stat. 341, 342-343. But we do deny that it is fully applicable here for the following reasons: The Omaha Tribe did not, as did the Agua Caliente band, have a trust patent covering the lands involved. Rather, prior to the allotting in severalty the Omahas held the land only under "original Indian title" [15] and were not to receive a trust patent until after completion of the allotment process, which patent would cover only lands not allotted in severalty. 59 F. 2d at p. 368; section 8, Act of August 7, 1882, 22 Stat. 341, 342. Thus, in the *First National Bank* case there was not, as here, any question of adjusting equities between the tribe and the individual Indian and the opinion made no mention of equities of the tribe. Inasmuch as the Agua Caliente Tribe's equitable title was not extinguished until the individual allotments were separated from the lands held in common by the issuance of individual trust patents, it is hard to see how the rights of the individual Indians can relate back and thus defeat the tribe's rights to the income earned while it had the equitable title.

Likewise inapposite here is the holding in *United States* v. *Whitmire*, 236 Fed. 474, 480 (C.A. 8, 1916),

---

[15] In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955), such "original Indian title" was held not to be a property right. Cf. *Miller* v. *United States*, 159 F. 2d 997, 999-1001 (C.A. 9, 1947).

that the Indian's right to an allotment became absolutely vested upon the filing of his selection and the court's reasoning therefrom that the issuance of a trust patent was merely a ministerial act (R. 139). The *Whitmire* case arose under the Act of July 1, 1902, 32 Stat. 716, providing for the allotment of lands of the Cherokee Nation. As was generally the case in the allotting of lands of the Five Civilized Tribes, that Act provided for the enrolling of all members of the tribe in advance of the allotting process and the issuance of an allotment certificate to each member so enrolled when he made his selection. Section 21 of the Act (32 Stat. at p. 718) declared that the allotment certificate was conclusive evidence of the right of the allottee to the land described therein. See 236 Fed. at p. 480. Under such a statute the issuance of a patent may well be said to be "nothing more than a ministerial act" (R. 139). But the situation under the Mission Indian Act is entirely different. Under that Act there was no provision for determination of entitlement prior to selection.[16] Rather, after the individual Indian had filed his selection, it was still necessary to determine whether he was in fact a member of the tribe and otherwise entitled to an allotment. Such determinations are not ministerial, so that plaintiff's rights can not be said to have vested in the same sense as the rights of the Indian in the *Whitmire* case. The difference between statutes relating to the Five Civilized Tribes and the General Allotment Act in this regard was made clear

[16] It is to be noted that the 1927 instructions for the allotting of the Agua Caliente Reservation provided for the issuance of a certificate of selection for allotment." See *United States* v. *Arenas*, 158 F. 2d 730, 736 (C.A. 9, 1946). There was no such provision in the alloting procedures here involved.

in *United States* v. *Reynolds,* 250 U.S. 104, 108-109 (1919). Clearly, the application of the proper allotment statutes can lead only to the conclusion that plaintiffs had no right to the income from the lands until after the trust patents were issued.

III

Even Assuming Jurisdiction Exists the Court Erred in Holding That It Was the Duty of the Secretary of the Interior and the United States to Apportion or Allot the Tribal Water Among the Individual Indians

We have argued, *supra,* pp. 29-32, that for various reasons the district court had no jurisdiction to make any declaration or adjudication as to the right of the allottees to share in the waters of the reservation. We shall now show that, if jurisdiction in the premises be assumed, the court erred in holding that the plaintiffs were entitled to have apportioned and it was the duty of the United States and the Secretary of the Interior to apportion the tribal water (R. 142-143, 145).

In so holding, the district court relied solely upon Section 7 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 390, 25 U. S. C. sec. 381, which provides:

> That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian

> proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

But this statute plainly contemplates merely the "distribution" of water and not its "apportionment". And as this Court has stated, it is applicable only when the supply of water is insufficient to furnish to each allotment water in an amount "as may be required to irrigate such lands." *United States* v. *McIntire,* 101 F. 2d 650, 654 (C. A. 9, 1939). It is clear, therefore, especially in view of the Congressional policy against the allotment of water in connection with the allotment of lands, *supra,* pp. 30-32, that the statute relied upon did not impose any duty to allocate a specific amount of water to each Indian.

Moreover, it is plain that under the circumstances of the instant case the statute did not even require any action by the Secretary in the "distribution" of water on the Agua Caliente Reservation. First, since, as the court found (R. 127), the reservation lands lie within a resort area and are chiefly valuable for resort purposes, their high value naturally precludes their use for agricultural purposes. At least there is no evidence of any substantial portion of the reservation being devoted to agriculture. But the sole basis for any action by the Secretary under the statute is that such action "is necessary to render lands within any Indian reservation available for agricultural purposes." Secondly, there are presently two systems for the distribution of tribal water, and control over the systems, including the scheduling of use by individual Indians, is exercised by the tribal committee (*supra,* p. 15). There has been no complaint by any Indian that he has not obtained the water he required for irrigation (R. 171-172), so that there

is no necessity for intercession by the Secretary. Consequently, the court's finding (R. 134), that the Secretary was remiss in performing the duties imposed by the statute is clearly erroneous, whether the duty be considered as one of apportionment or distribution.

CONCLUSION

For the foregoing reasons, it is submitted that those portions of the judgment relating to the accounting for income, the equalization of allotments and the apportionment of water should be reversed.

Respectfully,

Perry W. Morton,
Assistant Attorney General.
Laughlin E. Waters,
United States Attorney,
Los Angeles, California.
Roger P. Marquis,
John C. Harrington,
Attorneys, Department of Justice,
Washington 25, D. C.

September, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 356520 271

No. 14671

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Genevieve Pierce, Carrie Pierce McCoy, Anna Pierce, Ruth Carmichael nee Urton, Marcus Pete, Jr., and Elizabeth Pete,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEES.

John W. Preston,
John W. Preston, Jr.,
Oliver O. Clark,
David D. Sallee,
458 South Spring Street,
712 Rowan Building,
Los Angeles 13, California,
Attorneys for Appellees.

FILED
NOV - 2 1955
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Opinion below ... 1

Jurisdiction ... 1

Statutes involved ... 2

Statement ... 2

Pertinent findings ... 6

Appellant's contentions ... 8

Summary of argument ... 9

Argument ... 11

I.

The District Court had jurisdiction under 25 U. S. C. A., Section 345, as supplemented by 28 U. S. C. A., Section 2201, to judicially declare the Indians' rights to allotments in severalty and to equalize said allotments, to declare the Indians' rights to the income from lands selected by them without conflict from the dates of such selections, and to declare that each Indian is entitled to a just share of tribal waters and that such right is appurtenant to his land ... 11

The jurisdiction of the District Court continues until the allottment process is completed ... 16

II.

The District Court did not err in declaring that each Indian plaintiff is entitled to the income from his duly selected land from the date of selection, because such Indian becomes the equitable owner of the selected land from date of lawful selection, and thereafter tribal ownership of and rights therein cease ... 19

PAGE

III.

The District Court did not err in declaring that each of the Indian plaintiffs is entitled to a just share of the waters of the reservation, that his right thereto is appurtenant to his land, and that it is the duty of the United States to apportion tribal waters among the several members of the band 24

Conclusion 30

TABLE OF AUTHORITIES CITED

CASES

PAGE

Arenas v. Preston, 181 F. 2d 62 .... 3, 11, 15
Arenas v. United States, 158 F. 2d 730 .... 2, 6, 10, 12, 15, 22
Arenas v. United States, 322 U. S. 419 3
Ballinger v. United States, 216 U. S. 240 19
Barney v. Dolph, 97 U. S. 652 19
Bear Hill, Raymond, 52 L. D. 68 20
Colorado Power Co. v. Pac. Gas & Elec. Co., 218 Cal. 559 12
Deffeback v. Hawke, 115 U. S. 392 .... 20, 23
First Natl. Bank v. United States, 59 F. 2d 367 17
Gerard v. United States, 167 F. 2d 951 .... 13, 14
Hedrick v. Railroad Co., 167 U. S. 673 .... 20, 23
Hendrickson v. Bertelson, 1 Cal. 2d 430 12
Hy-yu-tse-mil-kin v. United States, 119 Fed. 114; aff'd, 194 U. S. 401 .... 13, 19
Lytle v. Arkansas, 9 How. 314 19
Morrison v. Work, 266 U. S. 481 13
Payne v. Central Pac. Ry. Co., 255 U. S. 228 19
Payne v. New Mexico, 255 U. S. 367 19
Sears v. Rule, 27 Cal. 2d 131 12
Simmons v. Wagner, 101 U. S. 260 .... 20, 23
Sloan v. Untied States, 95 Fed. 193 13
Smith v. Boniface, 132 Fed. 889 19
Sully v. United States, 195 Fed. 113 15
United States v. Arenas, 158 F. 2d 730 .... 13, 15, 17, 21
United States v. McIntire, 101 F. 2d 650 25
United States v. Payne, 284 Fed. 827 19
United States v. Powers, 305 U. S. 527 .... 25, 29
United States v. Preston, 202 F. 2d 740 .... 3, 15
United States v. Reynolds, 250 U. S. 104 22

PAGE

United States v. Whitmire, 236 Fed. 474 .... 17, 19, 20, 23

Wallace v. Adams, 143 Fed. 716; aff'd, 204 U. S. 415 .... 20, 23

Winters v. United States, 207 U. S. 564 25

Wyoming v. United States, 255 U. S. 489 19

Dictionary

Webster's International Dictionary 28

Statutes

Act of August 15, 1894 (28 Stat. 305) 2, 12

Act of August 15, 1894, as amended (31 Stat. 760, 36 Stat. 1167) 2, 13, 15

Act of June 25, 1948, as amended (62 Stat. 964, 63 Stat. 105) 2

Civil Code, Sec. 658 18

Mission Indian Act, Sec. 5 21

Mission Indian Act, Sec. 8 21

United States Code Annotated, Title 25, Sec. 323 27

United States Code Annotated, Title 25, Sec. 345 .... 1, 2, 9, 10, 11, 12, 14, 15, 16, 18, 27, 28

United States Code Annotated, Title 25, Sec. 381 .... 10, 25, 26, 27, 28, 29

United States Code Annotated, Title 28, Sec. 1353 .... 1, 2

United States Code Annotated, Title 28, Sec. 2201 .... 1, 2, 16, 27

United States Code, Title 28, Sec. 1291 1

Textbooks

22 California Jurisprudence, pp. 416-417 18

6 Corpus Juris Secundum, p. 136 .... 17, 18

30 Corpus Juris Secundum, Sec. 68, p. 421 12

42 Corpus Juris Secundum, Sec. 31, p. 700 25

73 Corpus Juris Secundum, p. 205 18

90 Corpus Juris Secundum, Sec. 384, p. 692 21

No. 14671

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Genevieve Pierce, Carrie Pierce McCoy, Anna Pierce, Ruth Carmichael nee Urton, Marcus Pete, Jr., and Elizabeth Pete,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEES.

Opinion Below.

The District Court's opinion is reported in 123 Fed. Supp. 554. Its findings of fact and conclusions of law are found in the Record at pages 126-143.

Jurisdiction.

The District Court had jurisdiction of this cause under 25 U. S. C. A., Section 345, as amended, and under 28 U. S. C. A., Sections 1353 and 2201.

This Court has jurisdiction on appeal under 28 U. S. C. A., Section 1291.

Statutes Involved.

The statutes involved are: The Act of August 15, 1894, as amended (28 Stat. 305; 31 Stat. 760; 36 Stat. 1167); and the Act of June 25, 1948, as amended (62 Stat. 964; 63 Stat. 105). These statutes are codified as 25 U. S. C. A., Section 345, and 28 U. S. C. A., Sections 1353 and 2201. These statutes are quoted at pages 3-5 of appellant's brief, hence need not be requoted here.

Statement.

The history of the litigation involving the efforts of the Agua Caliente Indians to secure allotments of land in severalty is briefly stated on page 5 of appellant's brief. This litigation began with the *St. Marie* case, filed in 1936, nearly ten years after the 1927 allotment proceedings had been concluded by H. E. Wadsworth, Special Allotting Agent. (24 Fed. Supp. 237.) No allotments to the Palm Springs Indians were ever made and approved by the Secretary of the Interior until 1949, and then only after a mandamus action had been filed by some fifteen members of the Band against the Secretary in the District Court for the District of Columbia. The judicial history of the efforts of these Indians to secure allotments of land in severalty will be found in the decisions of this Court. See *Arenas v. United States,* 158 F. 2d 730-758, where Judge Garrecht, speaking for the Court, set forth the applicable statutes, the failure of the Secretary to perform his duty in respect to allotments over a period of nearly thirty years, and of the Secretary's abortive efforts to induce Congress to permit him to withhold all lands of the Agua Caliente Band of Indians from allotment and to lease said lands as he might see fit. See, also, the decision of the Supreme Court in *Arenas v.*

United States, 322 U. S. 419. More recent decisions of this Court are found in *Arenas v. Preston,* 181 F. 2d 62, and in *United States v. Preston,* 202 F. 2d 740.

A few months after the filing of the mandamus action against the Secretary, as above mentioned, to wit, on July 21, 1948, a special allotting agent was formally appointed, and he was given instructions by the Commissioner of Indian Affairs on September 24, 1948, to proceed with the making of allotments to the members of said Band of Indians. [R. 127, 208-211.] On November 5, 1948, the allotting agent gave notice to all of the members of the Band to make and file with him their respective selections for allotment. On December 18, 1948, the appellees and 71 other members of said Band of Indians through one of their attorneys, to wit, Oliver O. Clark, filed their respective selections of lands for allotment in severalty with the allotting agent. The names of said Indians and the descriptions of the lands selected by them, respectively, are set forth in Exhibit "A" to the complaint [R. 17-19] which is entitled "Schedule of Allotment Selections by Allottees Agua Caliente Band of Mission Indians, Palm Springs, Californa, 1948." The selections set forth in said schedule were made by the adult members of the Band for themselves, respectively, and for their minor children; and in many instances after conferences, consultations and compromises between members of the Band who claimed and desired to select the same land for allotment in severalty The selections shown by said schedule, 74 in number, were agreed upon, were satisfactory to, and were approved in writing by more than two-thirds of all members of said Band of Indians and disapproved by none of them. [R. 6.] Four of the five members of the tribal committee also approved it.

The statement in appellant's brief, at page 8, that the selections shown in the schedule "were arbitrary selections made by the attorneys without the approval or consent of the individual Indians" is untrue and has no support in the record, except only that the answer of, or for, defendants Raymond Welmas, Richard Amado Miguel, and Georgianna Lorene McGlammary alleges that their parents or natural guardians had no authority to make selections for them, respectively.

In this connection appellant's brief states (p. 9):

> "These schedules together with the Clark schedule [Ex. 'A' to the complaint], were considered by the Bureau of Indian Affairs and the Department of the Interior [R. 217-231]. In February, 1949, the Department declined to approve the Clark schedule, approved Schudule No. 1 in its entirety, approved 19 selections on Schedule No. 2 which did not conflict with any selections on the Clark schedule, and held the remaining 27 selections in abeyance [R. 226-228]."

An appeal was taken to the Secretary of the Interior who, on February 1, 1950, affirmed the action of the allotting agent in all respects. After exhausting available administrative remedies on July 10, 1950, this action was filed by seven of the Indians whose selections had been made and filed and disallowed in whole or in part.

The record shows that as to each of the plaintiffs some of his or her selections, as shown by Exhibit "A" to the complaint, were not in conflict with the selections made by the other members of the Band, or by any or either of them. As to the selections made by appellees the judg-

ment shows that their non-conflicting selections are known and described as follows:

Genevieve Pierce. B selection (5 acres of irrigable land) S½ NE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E.

Carrie Pierce McCoy. A selection (2 acres) Block 44, Sec. 14, T 4 S, R 4 E; B Selection (5 acres irrigable land) S½ SE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E.

Anna Pierce. A Selection (2 acres) Block 45, Sec. 14, T 4 S, R 4 E; B selection (5 acres irrigable land) N½ SE¼ SE¼ SE¼ Sec. 22, T 4 S, R 4 E. [See R. 146.]

Notwithstanding the undisputed fact that the plaintiffs herein, and each of them, had made non-conflicting selections of valuable tracts of land from the lands included in the Agua Caliente Reservation which were filed with the duly appointed allotting agent on December 18, 1948, the Bureau of Indian Affairs and the Secretary of the Interior failed and refused to approve said non-conflicting selections and to issue trust patents for the lands embraced in said selections to the Indian plaintiffs entitled thereto. Said officers also failed and refused to account for and to pay the rentals and income from the lands embraced in said non-conflicting selections to the respective plaintiffs entitled thereto and have persisted in said failure and refusal to this day as to rentals collected my them from December 18, 1948, to the dates of issuance of trust patents to said lands. Said officials have also failed and refused to apportion the waters of the Reservation among the members of the Band, or to include in trust patents issued to the members of the Band any provision that

the allottees, respectively, are entitled to just and proper shares of the reservation waters, or that the right thereto is appurtenant to the allotted land. Said officials have also failed and refused to equalize the value of the allotments made to the plaintiffs herein and other Indians, although it is conceded by them that "the plaintiffs and all other members of the tribe (are entitled) to such equalization of allotments." (App. Br. p. 33.) At the date of the filing of this action, to wit, on July 10, 1950, the foregoing failures and refusals existed and no action had been taken by the Bureau or by the Secretary to correct them. Indeed, the appellant expressly or tacitly admits that it has taken no action in respect to the matters mentioned, and in effect argues that all such matters are exclusively within the discretion of the Secretary and that the courts have no jurisdiction to adjudicate the rights of the Indians in respect to the income from allotted lands, or to adjudicate their rights in and to the waters of the reservation, or to equalize the allotments made to the several members of the Agua Caliente Band of Mission Indians. This argument, based on alleged want of jurisdiction, follows the familiar and now hackneyed pattern used in the *Lee Arenas* case which was filed in 1940, and it has as little merit now as it had then.

Pertinent Findings.

In respect to income from non-conflicting selections of land the District Court made findings of fact as follows:

> "That the plaintiffs have equitable title to the lands included in their respective non-conflicting selections and, as the owners of the full equitable title, plaintiffs have the equitable right to all of the income from such lands from the dates of their respective

selections; that it is the duty of the United States to account to each of the plaintiffs for the income received from his or her said lands from the dates of said non-conflicting selections. That the United States has not as yet made such accounting to plaintiffs or any of them." [Finding XXIII, R. 135.]

In respect to equalization of allotments the District Court found:

"Plaintiffs (here appellees) * * * have not received their just and equitable share of the tribal lands in any of the allotment proceedings heretofore had for the benefit of the members of the Agua Caliente Band of Mission Indians; that each of them is entitled to total lands of approximately equal value to the lands allotted to each of the other members of said Band of Indians; that it is the duty of the Secretary of the Interior so to conduct further allotment proceedings that when the allotment and equalization process is completed each plaintiff will have been allotted land of as nearly equal value as practicable to the land allotted to each of the other members of said Band of Indians; that it is the duty of the Secretary of the Interior to equalize in value as nearly as practicable all the allotments made from the lands of the Agua Caliente Reservation." [Finding XXIV, R. 135-136.]

In respect to the waters of the Reservation the District Court found:

"The evidence further shows that the Secretary has been remiss in performance of the duty imposed upon him by law, not only in the allotment of the land proper to the Agua Caliente Band of Mission Indians, but also by his failure even until now to allot water rights appurtenant thereto * * *." [Finding XX, R. 134.]

The brief of appellant does not challenge the sufficiency of the evidence to support the foregoing and other findings of the District Court. Moreover, the evidence fully supports said findings and appellant's brief tacitly, if not expressly, admits the sufficiency of the evidence in that respect.

Appellant's Contentions.

Appellant, United States of America, contends:

(1) That the District Court had no jurisdiction to declare appellees' rights to income, the equalization of allotments, or the apportionment of water;

(2) That even if the District Court had jurisdiction in respect to income, it erred in holding that plaintiffs were entitled to the income from lands included in their non-conflicting selections from the dates thereof; and

(3) That even if the District Court had jurisdiction, it erred in holding that it was the duty of the Secretary and of the United States to apportion or allot the waters of the Reservation among the members of the Band.

Primarily, appellant's attack upon the judgment below is based upon the alleged lack of jurisdiction of the District Court to make judicial declarations of the rights of the Indians to income from their duly selected lands, to the equalization of their allotments with other allotments, and to a fair and just share of the waters of the Reservation.

Appellees' contentions appear in the summary of the argument, *infra.*

Summary of Argument.

I.

The District Court had jurisdiction under 25 U. S. C. A., Section 345, to judicially declare the Indians' rights to allotments in severalty and to equalize said allotments, to declare the rights of the Indians to the income therefrom, and to declare that each Indian is entitled to a just share of the tribal waters on the Reservation and that such right is appurtenant to the land allotted to him.

The jurisdiction of the District Court under 25 U. S. C. A., Section 345 continues until the allotment process is completed.

The allotment process is not complete until the allottee receives lands of approximately equal value to the lands allotted to each other member of the tribe or Band.

The allotment process is not complete until the allottee receives the income from his allotment of lands from the date of his non-conflicting selection thereof.

The allotment process is not complete until the allottee's right to a just share of the tribal waters is secured and made appurtenant to his allotted land.

The jurisdiction of the District Court under 25 U. S. C. A., Section 345 is not limited merely to declaring an Indian's right to an allotment of selected lands, but extends to the giving of relief to an Indian who has been unlawfully denied or excluded from land lawfully selected by him for allotment.

To deny an Indian allottee the income from his land, or his right to an allotment in value equal to the allotments of other members of the Band, or his right to a just share of the waters of the Reservation would be the equivalent of denying or excluding him from his lawfully selected land. (25 U. S. C. A., Sec. 345.)

Under its general equitable jurisdiction, conferred by 25 U. S. C. A., Section 345, the District Court has power to grant the declaratory relief decreed as to water, income from the selected lands, and equalization of allotments.

II.

When land is lawfully selected for allotment by an Indian entitled thereto he becomes the equitable owner thereof as of the date of his selection and the land so selected is thereby severed from tribal ownership.

The Agua Caliente Band of Mission Indians is not a necessary party to this action, since its tribal ownership of the lands involved ceased when said lands were lawfully selected for allotment by the several allottees.

Equitable ownership of duly selected lands is in no wise dependent upon the issuance of a trust patent thereto.

This court held in the *Lee Arenas* case that his right to the lands selected by him in 1927 was that of an equitable owner and directed that the trust period begin to run from from May 9, 1927.

The refusal of the United States to pay the Indians the income from the lands selected by them without conflict from the dates of their respective selections constitutes an unlawful exclusion from said lands under 25 U. S. C. A., Section 345.

III.

The District Court did not err in judicially declaring that the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands and that it is the duty of the United States to apportion said waters in such manner as will secure for each plaintiff a just share thereof. (See 25 U. S. C. A., Sec. 381.)

ARGUMENT.

I.

The District Court Had Jurisdiction Under 25 U. S. C. A., Section 345, as Supplemented by 28 U. S. C. A., Section 2201, to Judicially Declare the Indians' Rights to Allotments in Severalty and to Equalize Said Allotments, to Declare the Indians' Rights to the Income From Lands Selected by Them Without Conflict From the Dates of Such Selections, and to Declare That Each Indian Is Entitled to a Just Share of Tribal Waters and That Such Right Is Appurtenant to His Land.

It should first be noted that the jurisdiction granted to the District Court by the Act of 1894, as amended (25 U. S. C. A., Sec. 345) is essentially equitable. This Court has so held in *Arenas v. Preston,* 181 F. 2d 62, 66, where, among other things, the Court said:

> "Appellant United States in the instant case makes practically the same argument as it made in the Equitable case. That is, that the court cannot apply the general rule, to wit: That a court of equity may settle incidental questions as well as fundamental questions, because the applicable statutes in this case do not specifically authorize it. It is also argued that as to our case the applicable statute (*i. e.,* 25 U. S. C. A., Sec. 345) does not authorize the impression of a lien upon the (restricted) property, because its foreclosure would have the effect of disposing of a part of the property. But the Supreme Court rejected the argument by saying that it was intended that the restrictions on the allotted land, *which apply as well to produce from the land,* should afford protection to the allottee, rather than to restrict courts of equity from giving such protection * * *

"It seems to us that Congress could not have intended to commit the subject to its courts with any paralyzing limitation *but, in committing the subject to its courts it intended them to fully exercise their general equitable jurisdiction.*" (Emphasis added.)

The rule as above stated by this Court is in accord with the well recognized principle that a court of equity whose jurisdiction has been invoked for one purpose may determine all equities of the parties connected with the main subject of the suit, and equitable relief may thus be incidentally obtained even though the original bill would not lie for such relief alone.

> 30 C. J. S. 421, Sec. 68 of Equity and cases cited;
> *Sears v. Rule*, 27 Cal. 2d 131;
> *Hendrickson v. Bertelson*, 1 Cal. 2d 430;
> *Colorado Power Co. v. Pac. Gas & Elec. Co.*, 218 Cal. 559.

The argument of appellants here is essentially the same as that referred to in the *Arenas* case, *supra.* It is just as fallacious here as it was held to be there.

Since the District Court had equitable jurisdiction under Title 25 U. S. C. A., Section 345, which was properly invoked by plaintiffs-appellees, the general equity powers of that court could be, and were, exercised in declaring that they were entitled to the income from their duly selected lands, to equalization of their allotments with other allotments, and to a just share, each, of the waters of the reservation.

Section 345 of Title 25 U. S. C. A. is a codification of the Act of 1894 (28 Stat. 305), as amended by subsequent

Acts of Congress. (31 Stat. 760; 36 Stat. 1167.) Said section provides, in part, that

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land * * * or who claim to be so entitled * * * *or who claim to have been unlawfully denied or excluded from any allotment or parcel of land* * * * may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States * * *" (Emphasis added.)

This section of the United States Code not only gives an Indian the right to sue the United States in the District Court in respect to his right to an allotment of land in severalty, but also gives him the right to sue the United States in said court for unlawfully denying or excluding him from the possession, use and enjoyment of any parcel of land to which he rightfully claims to be entitled. Many cases hold that the statute giving an Indian the right to sue the United States impliedly confers jurisdiction upon the District Court to hear and determine such suit, which, obviously, is equitable in its nature.

> *Hy-yu-tse-mil-kin v. United States,* 119 Fed. 114, aff. 194 U. S. 401;
>
> *Sloan v. United States,* 95 Fed. 193;
>
> *Morrison v. Work,* 266 U. S. 481;
>
> *Gerard v. United States* (9 Cir), 167 F. 2d 951;
>
> *United States v. Arenas,* 158 F. 2d 730.

In the *Gerard* case, *supra,* this court held that the District Court not only had jurisdiction of actions involving the right of an Indian to an allotment, but also of a suit by such an Indian to protect his allotment; and this court

further held in that case that the statutory right of the Indian to sue under Section 345 Title 25 U. S. C. A. "is broad enough to include the United States." (*Id.* 167 F. 2d 954.) In other words, the Indian's right to sue for his allotment, or to protect his interest therein, is broad enough to include permission to sue the United States.

The 1894 Act (25 U. S. C. A., Sec. 345), as amended, is not limited merely to granting jurisdiction to the District Court to hear and determine an Indian's right to an allotment. The jurisdiction conferred by the Act extends, by its express terms, to hearing and determining the claim of any Indian that he "has been unlawfully denied or excluded from any allotment or parcel of land." Suppose, for example, that an allotment has been made and a trust patent has been issued to an Indian, but he is prevented by the Bureau of Indian Affairs or by the Secretary of the Interior from taking possession of his land; or suppose he takes possession, but the Bureau will not pay him the rentals and income from his land. Can there be any doubt whatsoever as to his right to sue for a declaration of his right to such rentals and income? Surely, not.

In the *Gerard* case, *supra,* two Blackfeet Indians had been allotted lands and trust patents had been issued to them. Without their consent the Bureau, some four months later, issued patents in fee to said Indians, thereby subjecting their lands to taxation by the State of Montana. The Indians sued, under 25 U. S. C. A., Section 345, to have the patents in fee declared null and void, to have the sale for taxes set aside, and for a declaration that they had the right to the immediate possession of said lands and that the same are immune from taxation. Judgment was against the Indians in the District Court,

but was reversed by this court in an opinion by Chief Judge Denman.

In *Sully v. United States,* 195 Fed. 113, it was held that where the failure of an Indian to be enrolled and allotted land was due solely to the misconduct of an officer of the United States, the Circuit Court (now the District Court) had jurisdiction to grant relief, and relief was granted against the United States under the provisions of the Act of February 6, 1901 (31 Stat. 760), now incorporated in 25 U. S. C. A., Section 345. The suit was held to be in equity and the relief granted to be equitable.

In the *Lee Arenas* case (*United States v. Arenas,* 158 F. 2d 730; *Arenas v. Preston,* 181 F. 2d 62; *United States v. Preston,* 202 F. 2d 740) this court not only decided that Arenas was entitled to an allotment of and trust patent to the lands selected by him as declared by the District Court, but also that the District Court had jurisdiction to award attorneys' fees to Arenas' attorneys and to impress an equitable lien upon his allotted lands to secure payment of such fees, and also to order the sale of his restricted lands to satisfy said lien and judgment.

The cases referred to refute the contention of appellant that the jurisdiction of the District Court under Title 25 U. S. C., Section 345 is limited to a judicial declaration that an Indian is entitled to an allotment of duly selected land and that such jurisdiction is exhausted by making such judicial declaration. (App. Br. p. 23.)

In this connection it should be further noted that Section 345 of 25 U. S. C. A. partakes of the nature of a declaratory judgment statute, and that the District Court

has jurisdiction thereunder to make the adjudications complained of by appellant without reference to 28 U. S. C. A., Section 2201 (the Federal Declaratory Judgment Act). The latter Act is, however, also applicable under the facts of this case.

It is, of course, true that the Federal Declaratory Judgment Act (28 U. S. C. A., Sec. 2201) does not *create* jurisdiction where none previously existed. But the point has no importance on this appeal, since it plainly appears that the District Court had jurisdiction under 25 U. S. C. A., Section 345 to make the declaratory adjudications embraced in the judgment appealed from, for reasons more fully stated, *infra*.

The Jurisdiction of the District Court Continues Until the Allottment Process Is Completed.

Section 345 of Title 25 U. S. C. A. is clearly designed to give the District Courts jurisdiction to try and determine the right of any Indian to an allotment of land in severalty, and to adjudicate the right of any Indian to the possession of such land together with the fruits thereof. This conclusion is justified by the language of said section, by the objects and purposes for which it was enacted, and by the decisions of this court and other federal courts holding that the section is not limited solely to a judicial determination, in the abstract, that an Indian is entitled, by virtue of selection, to an allotment of a particular tract of land.

As the trial court found, the allotment process is not complete until an Indian allottee is placed in possession of

his selected lands with the unquestioned right to receive the income therefrom. Nor is the allotment process complete until the Indian allottee is allotted lands which, in total value, are reasonably equal to the lands allotted to each of the other members of the tribe. Nor is it complete until such Indian receives, or is declared to have the right to, a fair and just share of the waters of the Reservation. This is so, because the title of an Indian to lands duly selected by him for allotment is a full equitable title, and is vested in him as of the date of his selection. Nothing remains thereafter to be done except the ministerial act by the Secretary of issuing a trust patent to the allottee. Full equitable title to the land includes the right to the possession, use and enjoyment thereof, and also of all appurtenances thereto and of all fruits thereof.

> *First. Natl. Bank v. United States,* 59 F. 2d 367;
> *United States v. Whitmire,* 236 Fed. 474, 480;
> *United States v. Arenas,* 158 F. 2d 730, 750.

An appurtenance to real property "means and includes all rights and interests in other property necessary for the full enjoyment of the property conveyed." (6 C. J. S. 136.) An appurtenance to realty also means "that which might become necessarily connected with the full and free enjoyment of the particular premises," and "the right to the use of those things which are essential to the full enjoyment of the premises conveyed and which were used as necessary incidents thereto." (*Id.*)

The term "real property" is defined in the California Civil Code, Section 658, as

> "Land; that which is affixed to land; that which is incidental or appurtenant to land; (and) that which is immovable by law * * *"

It has been held to include water, oil, minerals and other things underlying land, hence ownership of land includes the right to the full use and enjoyment of the fruits thereof.

> 6 C. J. S. 136, *supra;*
>
> 22 Cal. Jur. 416, *et seq.,* and cases cited.

As said in 22 California Jurisprudence 416-417:

> " 'Real property' includes both land and things which are affixed to land. Mining claims, water courses, oil, growing timber, growing crops (under certain circumstances), buildings attached to the soil, and other substances so attached as to be considered in law a part thereof, are real property. Likewise things which are incidental or appurtenant to land are considered real property."

Title to real property includes "the right which a person has to the possession of property, or to the enjoyment thereof" (73 C. J. S. 205), and this is true whether the title be in fee simple, or equitable. (*Id.*)

The failure and refusal of the Secretary of the Interior to allot lands to appellees of equal value and to pay them the income from the lands selected by them for allotments was a violation and a denial of their rights under Section 345 of Title 25 U. S. C. A., and the District Court had jurisdiction to adjudicate such rights. Of necessity, this jurisdiction must continue until a complete adjudication is made and the allotment process is completed.

II.

The District Court Did Not Err in Declaring That Each Indian Plaintiff Is Entitled to the Income From His Duly Selected Land From the Date of Selection, Because Such Indian Becomes the Equitable Owner of the Selected Land From Date of Lawful Selection, and Thereafter Tribal Ownership of and Rights Therein Cease.

Appellant contends, in substance, that the tribal ownership of lands selected for allotment by individual members of the tribe continues until the selections are approved and trust patents are issued, hence the Band is a necessary party to this action. This is not the law.

For nearly a century it has been well settled that where an individual in the prosecution of a right does everything which the law requires of him to do, and fails to attain this right by reason of the misconduct or neglect of a public officer, the law will protect him by considering as done that which ought to have been done.

Lytle v. Arkansas, 9 How. 314;
Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401;
United States v. Whitmire, 236 Fed. 474;
Smith v. Boniface, 132 Fed. 889, 891;
Barney v. Dolph, 97 U. S. 652;
Ballinger v. United States, 216 U. S. 240;
United States v. Payne, 284 Fed. 827;
Payne v. New Mexico, 255 U. S. 367;
Wyoming v. United States, 255 U. S. 489;
Payne v. Central Pac. Ry. Co., 255 U. S. 228.

This principle has been applied to entrymen of public lands, to Indians who have made lawful selections of land for allotment in severalty, and others in similar situations.

> "This rule is based on the theory that by virtue of his compliance with the requirements, he (a claimant to public land) has an equitable title to the land; that in equity it is his and the Government holds it in trust for him although no *legal* title passes until patent issues. (Citing cases.) *It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."* (Raymond Bear Hill, 52 L. D. 68.) (Emphasis added.)

In *United States v. Whitmire,* 236 Fed. 474, at page 480, the Court said:

> "The fact that no patent had been issued to Whitmire (an allottee) when he made the conveyance to Greenlees is immaterial. When the right to a patent has once become vested under the law, it is the equivalent, so far as the government is concerned, to a patent actually issued. Citing:
>
> *Simmons v. Wagner,* 101 U. S. 260;
>
> *Deffeback v. Hawke,* 115 U. S. 392;
>
> *Hedrick v. Railroad Co.,* 167 U. S. 673;
>
> *Wallace v. Adams,* 143 Fed. 716, aff. 204 U. S. 415.

In *United States v. Arenas,* 158 F. 2d 730, at page 750, this court said:

> "We therefore hold that the appellee (Lee Arenas) has acquired an equitable title to the lands covered by his selection for allotment and the certificate therefor issued by Wadsworth * * * (and) an allotment trust patent to the lands covered by his certificate should be issued to him by the United States [R. 24, 158-160] *as of the date of the schedule of selections for allotment, May 9, 1927.*" (Emphasis added.)

Apparently, appellant contends that an Indian can acquire no rights in lawfully selected lands until a trust patent thereto is issued to the Indian. This contention not only ignores such Indian's equitable title to the selected land as of the date of selection, but also ignores the fact that appellant, as trustee, holds the trust property and all fruits and income therefrom in trust for the beneficiary Indian.

It is a general rule that

> "* * * trustees * * * are chargeable in their accounts with the whole of the estate committed to, or received by, them, or which has actually come into their possession, custody, or control, *including the net income, product, or rents and profits arising from the trust res.*" (90 C. J. S. 692, Sec. 384 of Trusts.) (Emphasis added.)

Appellant quotes portions of Sections 5 and 8 of the Mission Indian Act (its brief, pp. 36-37) to sustain its contention that plaintiffs are not entitled to the income from their selected lands until trust patents are issued to them, respectively. But the provisions quoted have no application where the Secretary of the Interior fails and

refuses to issue the trust patent with reasonable promptness. This court held in the *Lee Arenas* case that the Secretary should have issued the trust patent to Arenas on May 9, 1927, which was the approximate date of his selection. Why? Because, undoubtedly, the trust patent should follow promptly the lawful selection. And, this court no doubt realized that the Secretary should not be permitted to withhold a trust patent for many years, collect the income from lawfully selected lands, and then refuse to pay such income to the equitable Indian owner on the ground that no patent had issued by reason of the Secretary's failure and refusal to perform his ministerial duty. Such a concept is contrary to reason, justice, and the many decisions of the federal courts cited, *supra*.

Appellant cites *United States v. Reynolds,* 250 U. S. 104, 109, in this connection. But that case merely holds that a restricted Indian cannot alienate his allotted lands during the trust period of tweny-five years and the lawfully extended period of ten years. It may be noted that the Indian's selection of land was approved by the Secretary on September 16, 1891, and trust patent was issued on February 6, 1892, about five and one-half months later. Moreover, the question whether the Government could lawfully withhold from the Indian selector the income from his lands after a lawful selection was not involved in that case.

Appellant suggests that there is involved herein a question of adjusting equities between plaintiffs and the tribe. This means, if anything, that all other members of the

Band were entitled to and were given trust patents immediately after filing their selections and to the income therefrom at all times thereafter, but that plaintiffs must wait for years to receive trust patents. It also means that plaintiffs-appellees, now three in number, must share the income from their lawfully selected lands from dates of selections to dates of trust patents with all other members of the Band, almost one hundred in number. This naked statement is, alone, sufficient to explode the theory of adjusting equities, or even that any equities exist as between plaintiffs and the Band.

Appellant thus ignores the well-settled rule of equity that

> "When the right to a patent has once become vested under the law, it is the equivalent, so far as the government is concerned, to a patent actually issued." (*United States v. Whitmire,* 236 Fed. 474, 480.) See also:
>
> *Simmons v. Wagner,* 101 U. S. 260;
>
> *Deffeback v. Hawke,* 115 U. S. 392;
>
> *Hedrick v. Railroad Co.,* 167 U. S. 673;
>
> *Wallace v. Adams,* 143 Fed. 716, aff. 204 U. S. 415; and many other cases cited, *supra.*

It may be added that if the Secretary of the Interior may withhold trust patents, as here, for many years and claim thereby the right to deprive Indians of the income from their lawfully selected lands, abuses of power and discretion will not only continue but will multiply and increase under practices followed by him in the allotment of lands to the Agua Caliente Indians.

III.

The District Court Did Not Err in Declaring That Each of the Indian Plaintiffs Is Entitled to a Just Share of the Waters of the Reservation, That His Right Thereto Is Appurtenant to His Land, and That It Is the Duty of the United States to Apportion Tribal Waters Among the Several Members of the Band.

Appellant insists that even if the District Court had jurisdiction to declare that each Indian plaintiff is entitled to a just share of the waters of the Reservation, it erred in holding that it is the duty of the Secretary of the Interior to apportion such waters among the Indians entitled thereto. The real reason advanced for this anomalous position is that the alleged discretion of the Secretary cannot be disturbed by a judgment of the court.

It must be remembered that allotments in severalty to the members of the Agua Caliente Band of Mission Indians consisted, for each Indian, of (1) a two-acre tract of land suitable for business; (2) a five-acre tract of irrigable land; and (3) a forty-acre tract of desert, or non-irrigable land. The three kinds of land were by the Secretary ordered made to each Indian. [R. 28-34.]

It should also be remembered that the waters of the Agua Caliente Reservation do not uniformly occur in all parts of the Reservation lands, but only in a few areas thereof. The Reservation lands also consist of even numbered sections, and the area in which they are situated is thereby of a checkerboard character. In view of these facts, a judicial declaration of the right of each Palm Springs Indian to a just share of the tribal waters and that such right is appurtenant to his land assumes added importance amounting to necessity if he is to have the

value, use and enjoyment of the irrigable land. Notwithstanding these facts, the Secretary has never taken any action in reference to the waters of the Reservation in the respects mentioned. [R. 134, Finding XX.]

The right of an Indian allottee to a just share of tribal waters cannot reasonably be questioned.

> *United States v. Powers,* 305 U. S. 527, 532;
> *Winters v. United States,* 207 U. S. 564;
> *United States v. McIntire,* 101 F. 2d 650;
> 25 U. S. C. A., Sec. 381;
> 42 C. J. S. 700, *et seq.,* Sec. 31 of Indians.

This legal right, under the circumstances of this case, is a proper subject for a declaratory judgment. Since Reservation waters, under general rules of law, are appurtenant to the Reservation lands, it is difficult to understand why the court, in declaring the Indians' rights to allotments of such lands, cannot also declare their rights to all appurtenances thereto, including waters.

Moreover, in respect to Reservation waters, the United States is trustee holding title for the members of the tribe, and the trustee-*cestui que trust* relationship continues, and applies to the individual Indian as to his land, after an allotment in severalty is made to him.

> *United States v. Powers, supra;*
> *United States v. McIntire, supra;*
> 43 C. J. S. 700, *et seq., supra.*

An Indian allottee's right to a just share of tribal waters, and to an apportionment thereof under such facts as exist in this case, is implicit in 25 U. S. C. A., Section 381; and the Secretary's failure to make adequate pro-

vision therefor in the allotment proceedings herein constituted an abuse of official discretion, if he had any. Section 381, *supra,* provides:

> "In the cases where the use of water is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation * * *"

Appellant construes Section 381, *supra,* to mean that the Secretary has uncontrolled, and uncontrollable, discretion to apportion, or to refuse to apportion, the waters of the Agua Caliente Reservation. Appellees say no such uncontrollable discretion exists, or has ever existed. That the Secretary has a measure of discretion in the apportionment of the waters of an Indian Reservation under Section 381, *supra,* is not denied; but his discretion does not extend to a failure and refusal to make such apportionment of water for the irrigation of lands, admitted and declared by him to be irrigable, for more than six years after allotment thereof in severalty. This is precisely what he has done in respect to the lands of the Agua Caliente Reservation.

The judgment of the District Court declares [R. 145]:

> "That the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, and plaintiffs are entitled to have apportioned, and it is the duty of United States of America to apportion, the waters upon the Reservation of said Band of Indians in such manner as will secure for each plaintiff a just share of the tribal waters." (Par. II.)

An Indian allottee is, by the express provisions of the statute (25 U. S. C. A., Sec. 381) entitled to a just and equal share of the tribal waters. Apparently, appellant objects to a judicial declaration that such Indian has the right conferred by statute.

The judgment below declares that it is the duty of the United States to apportion the tribal waters of the Agua Caliente Reservation. Can there be any doubt as to such duty under the facts of this case? Of course, not. The District Court found, in this connection, that

> "The evidence shows that the Secretary has been remiss in performance of the duty imposed upon him by law, not only in the allotment of the land proper to the Agua Caliente Band of Mission Indians, but also by his failure even until now to allot water rights appurtenant thereto * * *"

The remissness in the performance of his duty by the Secretary, as above found, at the date of the judgment, had continued from January 1949, to September 29, 1954 (more than five years), and by the admissions in appellant's brief still continues. Is there no remedy for such a gross abuse of discretion, if he had any? Of course there is a remedy, and jurisdiction is vested in the District Court by 25 U. S. C. A., Section 345 and 28 U. S. C. A., Section 2201, to declare such abuse of discretion and to adjudicate the right of the Indian allottee to a just and equal share of the tribal waters.

Cf. 25 U. S. C. A., Sec. 323.

If appellant's contentions in respect to the Secretary's claimed uncontrollable discretion in the apportionment of tribal or reservation waters should be upheld, then it logically follows that he could refuse forever to make a

necessary apportionment of such waters. In that event, lands allotted as irrigable could and would be made as arid as those declared to be and allotted as arid lands.

Moreover, the Secretary's failure and refusal to apportion the waters of the Reservation violates the right of each Indian to a full and complete allotment of land in severalty and constitutes an exclusion of him from his selected lands to the extent of such denial. It is conceivable that an Indian allottee might be wholly dependent for a living upon the fruits of the irrigable portions of his allotment. In such event, could it be reasonably contended that such Indian could not litigate his right to a just and equal share of the waters of the reservation under 25 U. S. C. A., Section 345? The answer is obvious, for under those circumstances such Indian, because he has been "unlawfully denied or excluded from any allotment or parcel of land" to which he is entitled, "may commence and prosecute or defend any action, suit, or proceeding in relation" thereto. (25 U. S. C. A., Sec. 345.) Thus, discretion, if any, must yield to the statute.

In its comment on 25 U. S. C. A., Section 381, appellant states (its brief, p. 43) "this statute plainly contemplates merely the 'distribution' of water and not its 'apportionment.'" This is splitting hairs that do not exist. The meaning of the words "distribution" and "apportionment" is the same.

Webster's International Dictionary defines "apportionment" as follows:

> "The division of rights or liabilities among several persons entitled or liable to them in accordance with their respective interests * * *"

The verb "apportion" is defined to mean

> "To divide and assign in just proportion; to divide and distribute proportionately; to make an apportionment of; to allot * * *"

The word "distribution" is defined as the

> "Act of distributing; apportionment among several or many; as, distribution of gifts."

The judgment of the District Court in this behalf goes no further than to declare

> "That the right to a just share of the tribal waters is appurtenant to and accompanies each allotment of tribal lands, and plaintiffs are entitled to have apportioned, and it is the duty of United States of America to apportion, the waters upon the Reservation of said Band of Indians in such manner as will secure for each plaintiff a just share of the tribal waters."

There can be no doubt that the District Court correctly declared the law in respect to the waters of the Agua Caliente Reservation, and in respect to the duty of the United States to make an apportionment (*i. e.,* distribution, division) thereof among the members of the Band.

This court, in *United States v. Powers,* 94 F. 2d 783, construed Section 381 of Title 25 U. S. C. A., *supra,* to mean under the facts of that case that

> "* * * the Secretary of the Interior was authorized to prescribe rules and regulations *to secure the just and equal distribution of said water among the Crow Indians,* but he was not authorized, by rule, regulation, or otherwise, to deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of said waters." (*Id.,* p. 786.) (Emphasis added.)

The word "duty" does not appear in the quoted statement, *supra,* but, we submit, is implicit therein. Certainly, this court's statement, *supra,* is authority for the proposition that each and every member of the Agua Caliente Band of Indians is entitled to a just and equal distribution of the waters of the Reservation, and that this right is appurtenant to his allotment.

Appellant's position, as set forth in its brief, intimates that only the plaintiffs are interested in the judgment in this case. This is incorrect. The whole Band of the Agua Caliente Indians, as a class, is interested in the District Court's judicial declaration in respect to the rights of said Indians in and to the waters of the Reservation, in the income from their allotted lands, and in the equalization of their allotments. Any decision below, or here, adverse to the plaintiffs in respect to waters, income, and equalization of allotments would affect *all* members of the Band. The judgment herein affords protection alike to each and all members of the Band in the respects and as to the matters hereinabove mentioned and set forth. The judgment should be affirmed.

Conclusion.

Appellees, therefore, respectfully submit that the District Court committed no error in its judgment and that it should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
JOHN W. PRESTON, JR.,
OLIVER O. CLARK,
DAVID D. SALLEE,
Attorneys for Appellees.

No. 14671

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GENEVIEVE PIERCE, CARRIE PIERCE McCOY, ANNA PIERCE, RUTH CARMICHAEL, NEE URTON, MARCUS PETE, JR., AND ELIZABETH PETE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR THE UNITED STATES

PERRY W. MORTON,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney, Los Angeles, California.
ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice, Washington 25, D. C.

FILED

DEC 15 1955

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Statement	1
1. There was no inordinate delay in the making of allotments	2
2. The so-called Clark Schedule was not a selection of allotments by all members of the band	6
3. The facts as to alleged delays in issuance of patents to appellees' nonconflicting selections	11
4. The facts as to alleged delay in equalization of allotments and apportionment of water	13
5. The Government does challenge what appellees call the "Pertinent Findings."	15
Argument:	
I. The district court had no jurisdiction to make declarations as to the Indians' rights to an accounting for income, the equalization of allotments, or the apportionment of tribal water	16
II. Even assuming the existence of jurisdiction the district court erred in holding that plaintiffs were entitled to the income derived from the lands included in their nonconflicting allotment selections from the dates of their selections	20
III. Even assuming jurisdiction exists the court erred in holding that it was the duty of the Secretary of the Interior and the United States to apportion or allot the tribal water among the individual Indians	24
Conclusion	28
Appendix	29

CITATIONS

Cases:

Arenas v. *Preston*, 181 F. 2d 62, certiorari denied, 340 U. S. 819	18–19
Arenas v. *United States*, 197 F. 2d 418	18, 23
Deffeback v. *Hawke*, 115 U. S. 392	27
First Nat. Bank of Decatur, Neb. v. *United States*, 59 F. 2d 367	22
Lemieux v. *United States*, 15 F. 2d 518, certiorari denied, 273 U. S. 749	22
Muskogee County v. *United States*, 133 F. 2d 61	25
Myers v. *Bethlehem Corp.*, 303 U. S. 41	17
Reynolds v. *United States*, 174 Fed. 212	17
Reynolds v. *United States*, 252 Fed. 65	21
United States v. *Arenas*, 158 F. 2d 730, certiorari denied, 331 U. S. 842	23
United States v. *Powers*, 305 U. S. 527	27
United States v. *Reynolds*, 250 U. S. 104	20, 22–23
United States v. *Whitmire*, 236 Fed. 474	22
Wallace v. *Adams*, 143 Fed. 716, affirmed, 204 U. S. 415	22

368992—55——1

Statutes: Page

General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. sec. 381 ---------- 24

Mission Indian Act of January 12, 1891, 26 Stat. 712 ---------- 20

Miscellaneous:

Raymond Bear Hill, 52 L. D. 688 ---------- 22

19 Am. Jur., Equity, sec. 132 ---------- 18

30 C. J. S. Equity, sec. 67 ---------- 18

In the United States Court of Appeals for the Ninth Circuit

No. 14671

United States of America, appellant

v.

Genevieve Pierce, Carrie Pierce McCoy, Anna Pierce, Ruth Carmichael, nee Urton, Marcus Pete, Jr., and Elizabeth Pete, appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR THE UNITED STATES

STATEMENT

In our Opening Brief (pp. 5–18) we presented a fair, complete and accurate statement of the facts pertinent to the understanding and determination of the issues presented on appeal. In contrast appellees' statement of the facts (Appellee's Brief, pp. 2–8) is argumentative and contains many inaccuracies. While in some instances these inaccuracies relate to matters which we believe to be immaterial to the resolution of the issues presented, we feel compelled to state the true facts in some detail to show the lack of validity of appellees' argument, based on their version of the facts, that the Agua Caliente Indians

can obtain justice at the hands of the Government only by intervention by the court in the whole allotment process.

1. *There was no inordinate delay in the making of allotments.*—In their brief (pp. 2–3) appellees refer to the litigation as to the right of the Agua Caliente Indians to receive allotments and state, "No allotments to the Palm Springs Indians were ever made and approved by the Secretary of the Interior until 1949, and then only after a mandamus action had been filed by some fifteen members of the Band against the Secretary in the District Court for the District of Columbia." It is true that after the 1927 allotment proceedings no trust patents had been issued until 1949. But there is no warrant in the facts for any inference that, after the final decision in the *Arenas* case that the Indians were entitled to allotments, the Secretary of the Interior failed or refused to take any action in the premises except under the threat of mandamus. In the first place it should be borne in mind that both the *St. Marie* litigation and the first decision of this Court in the *Arenas* case affirmed the Secretary's decision that no allotments should be made on the Agua Caliente Reservation. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal. 1938), affirmed, 108 F. 2d 876 (C. A. 9, 1940), certiorari denied, because petition filed out of time, 311 U. S. 652 (1940); *Arenas* v. *United States,* 137 F. 2d 199 (C. A. 9, 1943), reversed, 322 U. S. 419 (1944). And the subsequent *Arenas* litigation, which established the right of the Indians to allotments, was not concluded until June 9, 1947, when the Supreme Court

denied the petitions for certiorari filed both by the Indian plaintiff and the Government. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945), affirmed in part and reversed in part, 158 F. 2d 730 (C. A. 9, 1946), certiorari denied, 331 U. S. 842 (1947). Thus, the only pertinent period, insofar as any charge of inordinate delay by the Secretary is concerned, is the time between June 9, 1947, and February 18, 1949. On the latter date the Secretary directed that trust patents should be issued for allotments as to which there were no conflicting selections (R. 226–227). This delay of substantially less than two years [1] can hardly be termed inordinate, especially since, as the Supreme Court recognized (*Arenas* v. *United States,* 322 U. S. 419, 430 (1944)), "this is no ordinary allotment problem." And least of all can the events which took place during that period lead to any inference that an allotment program was undertaken only as a result of the filing of a mandamus action.

The mandamus complaint was filed on February 16, 1948.[2] The record in the present case reveals that long before that date and ever since the denial of the petitions for writs of certiorari in the *Arenas* case in June, 1947, the allotting of lands on the Agua Caliente Reservation had been given continuous at-

---

[1] By way of contrast this suit filed by appellees has delayed the completion of the allotment process for almost five years from July 10, 1950, when the suit was filed (R. 16), to June 23, 1955, when appellees' cross-appeal was dismissed on stipulation.

[2] Some time later, after some trust patents had been issued and before any hearing on the merits, the complaint was dismissed without prejudice.

tention in the Department of the Interior (R. 197, 198, 200). It was then agreed that the allotment process should be expedited and that allotments should be made in a manner which would, as far as practicable and feasible, do full justice and equity to the individual members of the band and which would be consistent with existing laws and regulations (R. 198). It cannot be denied that the problem of devising an equitable allotment procedure for the Agua Caliente Reservation (already recognized by the Supreme Court as presenting greater than usual problems) was made more difficult and complicated by many factors including the facts (1) that some few of the 1927 selections were validated as a result of the *Arenas* litigation, while the great majority of such selections were invalidated by the decisions in the *St. Marie* case and *Hatchitt* v. *United States,* 158 F. 2d 754 (C. A. 9, 1946) ; (2) that only half of the members of the band had made selections in 1927; and (3) that since 1927 there had been a great change of value in the tribal land adjacent to the Palm Springs' city limits (R. 198). For example, some of the lands in Sections 14 and 22, which had been classified as grazing lands in 1927 (thus subject to "C" selections of 40 acres), had greatly increased in value because of the development of lands in adjacent sections so that the selection of these lands in 40-acre tracts would clearly result in inequities and prevent the allotting of lands of approximately equal value (R. 202–203).[3]

[3] The court below found, contrary to the contention of appellees (R. 10–11), that the adoption of this recommendation by the Secretary (R. 210) was not an abuse of discretion in the equitable allotment of the tribal lands (R. 134, Finding No. XXII).

Obviously, the solution of such problems, and there were many, required careful consideration at all departmental levels before any public announcement of the allotment procedure could be made. And that there had been careful consideration of such problems from the time of final decision in the *Arenas* case is manifested by the fact that, after the Secretary directed the Commissioner of Indian Affairs on April 8, 1948, to proceed with the making of allotments in accordance with a broadly outlined plan (R. 194–196),[4] agents of the Government performed much work on the ground (R. 197–209) and on November 5, 1948, were able to request the Indians to make their selections (R. 213; see also Plaintiffs' Exhibits Nos. 19 and 20),[5] all this despite considerable outside interference with the allotment procedure (see Government's Opening Brief, p. 7, fn. 4; see also Plaintiffs' Exhibits Nos. 71, 72, 79, 80, 109).[6] Indeed, counsel for appellees are on record as stating

[4] Appellees conveniently omit reference to the Secretary's instructions of April 8, 1948, in their incomplete statement (Br. 3) as to the actions taken by the Department of the Interior after the filing of the mandamus action.

[5] Plaintiffs' Exhibits Nos. 19 and 20 are not printed in the record on this appeal, and according to the clerk's certificate (R. 161–162) they were not transmitted to this Court as part of the record on appeal, which record included items designated by appellees for purposes of their cross-appeal. However, the exhibits were counterdesignated by the Government in connection with appellees' cross-appeal, and, if the truth or falsity of statements based upon such exhibits is deemed material in any way to the decision on this appeal, it is requested that an opportunity be given to have a supplemental record certified to this Court pursuant to Rule 75 (h), F. R. C. P.

[6] The comment in footnote 5, *supra*, as to Exhibits Nos. 19 and 20 is also applicable to these exhibits.

that the conduct of the government agents in carrying out the allotment instructions has been "punctilious, courteous and cooperative in every respect" (R. 236). Plainly, ever since the final decision in the *Arenas* case the allotting of the reservation has proceeded as expeditiously as the circumstances permitted. An analogy which, we believe, shows that unusual attention has been given this reservation with resulting expedition is the fact that it took 10 years to prepare the definitive 1927 allotment schedule after passage of the 1917 amendment to the Mission Indian Act.

2. *The so-called Clark Schedule was not a selection of allotments by all members of the band.*—In their brief (pp. 3–4) appellees identify Exhibit A to their complaint as the so-called Clark schedule, referred to in the Government's Opening Brief (pp. 8–9), and state that the schedule listed the allotment selections made by all 74 members of the Agua Caliente Band. In its amended answer (R. 75), the Government admitted that plaintiffs, through their attorneys, had filed a schedule of selections for allotments with various government officials, but denied that Exhibit A to the complaint was an accurate copy of said schedule. And the record made in the district court not only demonstrates the propriety of the denial but also reveals many other inaccuracies in appellees' statement. A comparison of Exhibit A to the complaint and the "Clark" schedule (Plaintiffs' Exhibit No. 28 (g) in evidence) will reveal not only a decided variance in the form of the two schedules but also discrepancies in the descriptions of several selections and the complete absence of any selection for allottee

No. 74 on the "Clark" schedule.[7] All these variations are individually of a rather insubstantial nature, but they are indicative of the general inaccuracy of the assertions (see Appellees' Brief, pp. 3–4) that the selections listed had been approved in writing by more than two-thirds of the members of the band and by four of the five members of the tribal committee, and that the selections shown on these schedules were in all cases made by the Indians themselves rather than, as the Government has asserted (Br. 8), in some cases by the attorneys for appellees without the consent or approval of the individual Indians.

Appellees charge that the Government's brief contained false statements, saying (Br. 4) that the statement that the selections in the schedule were made by the attorneys without the consent or the approval of the individual Indian "is untrue". Reference to the pages of the record cited by the Government in support of its statement (R. 41–43, 49–50, 52–55) will show that not only Raymond Welmas and Georgianna Lorene McGlammery[8] but also Augusta Patencio Torro, Ronald Richard Saubel, Albert Welmas, Alena Ramona Welmas, Dora Joyce Welmas, Corrinne

[7] Exhibit A shows selections for only 72 Indians instead of the 74 claimed by appellees because two numbers (43 and 44) are blanks (R. 17–19). Also, Exhibit A lists selections (Nos. 12 and 26) for Larry Norman Hatchitt and Lawrence Pierce, who were not at the time enrolled members of the band (R. 238).

[8] Appellees (Br. 4) also refer to the answer of Richard Amado Miguel. Reference to his answer (R. 42) will show that he admitted having authorized the Preston group to file on his behalf the selections listed for him on Exhibit A to the complaint, but that he alleged that he later repudiated those selections and reaffirmed the selections previously filed with the allotting agent.

Welmas, Glorianne Yvonne Welmas, and Robert Steven Saubel likewise denied that the selections listed for them on Exhibit A had been made by them or by any authorized person on their behalf. For example, the answer of Torro states that she "denies that the selections listed under No. 54 on the schedule of which Exhibit A to the complaint purports to be a copy were made by her, or by anyone authorized to act in her behalf" (R. 49). This serious charge of appellees is thus directly contradicted by the record.

Indeed, the assertion (Br. 3) that all selections listed on the "Clark" schedule were made by the Indians themselves or their parents is of comparatively recent origin and was not made by the person who prepared the schedule at the time of its preparation. When on December 17, 1948, Oliver O. Clark forwarded to the Assistant Secretary of the Interior the written selections of 41 members of the band, he referred to them as "the selections of allotments as made by the members of the Agua Caliente Band of Mission Indians at Palm Springs, in Riverside County, California, represented by us as their attorneys-at-law" (Plaintiffs' Exhibit No. 22). And in referring to the schedule which was to be transmitted under separate cover, he stated that it was "prepared in accordance with information we have as to the selections which have been made *and* which are not in conflict with other selections * * *" (Plaintiffs' Exhibit No. 22).[9] And in forwarding the schedule on January 13, 1949, he referred to it as a "Schedule of allotment selections by *and for* the eligible members" (Plain-

[9] Emphasis is supplied throughout this brief.

tiffs' Exhibit No. 28). There is nowhere to be found any direct, contemporaneous statement that all the selections shown on the Clark schedule were made by the Indians themselves or by their authority. Rather, the guarded language of the transmittal letters, the denials of authorization by various Indians (R. 41–43, 49–50, 52–55), and the fact that signed selections of only 41 members were submitted make it obvious that what happened was that when selections of any Indian filed with the allotting agent were in conflict with the selections filed through the Preston group, a lieu selection was made, without his knowledge or consent, for the allottee who had filed at the agency.

It is likewise clear that the Clark schedule (Plaintiffs' Exhibit No. 28 (g)) could not possibly have been approved by a majority of the adult members of the band or by a majority of the tribal committee on December 17, 1948, as appellees assert (R. 6) and as the schedule itself purports to have been approved.[10] On the evening of December 17, 1948, the tribal committee held a meeting at which Oliver O. Clark presented for approval a document entitled "Schedule of Allotment Selections by Allotees, Agua Caliente, Band of Mission Indians, Palm Springs, California, 1948" (Plaintiffs' Exhibit No. 23; Defendant's Ex-

[10] The asserted approval of the Clark schedule, even if established, is not conceded to be of any materiality in the resolution of the conflicting selections (see R. 221–222), and apparently the court below considered the approval or lack of approval to be immaterial, since it made no finding in the matter and held that the individual defendants were entitled to allotments for those selections as to which there were conflicts with appellees (R. 137–138).

hibit I; Testimony of Lorene (Lena) Welmas, then chairman of tribal committee, reporter's transcript of proceedings, pp. 120, *et seq.*). In a portion of this document headed "Approval of Allotees" there appeared the signatures of 17 members of the band, similar to the signatures on the Clark schedule. This document was in the exact same form as the Clark schedule with separate columns for the name of each Indian and the designation of his 2-acre, 5-acre and 40-acre selection. But both the 5-acre and 40-acre columns were completely blank in all cases and the 2-acre column was filled in in only 14 instances. Thus, it is plain that the four members of the tribal committee approved a schedule which was virtually blank as to the most important information—the selections. The prior approval of the 17 members of the band was in the same category. Obviously, the selections appearing on the Clark schedule and Exhibit A to the complaint were not approved on December 17, 1948, as asserted.[11] We submit, therefore, that the Government's statement (Br. 7–10) as to the various schedules and the administrative action thereon is correct. Particularly do we reiterate (1) that only 41, not all of the members of the band, filed selections through the Preston group; (2) that many selections appear-

[11] It is interesting to note that, when the Preston group under cover of a letter dated December 17, 1948, forwarded to the Secretary of the Interior copies of the 41 selections filed through them, it was stated that the schedule of allotment selections would be transmitted under separate cover (Plaintiffs' Exhibit No. 22). However, the schedule was not transmitted until January 13, 1949 (Plaintiffs' Exhibit No. 28). Query: Why the delay if the schedule had been approved, as claimed?

ing on the Clark schedule were not authorized by the Indians concerned; (3) that 19 of those who filed selections through the Preston group soon repudiated those selections and affirmed prior selections filed with the official allotting agent; (4) that at the time the present action was filed all members of the band except the seven plaintiffs had adjusted their selections and received trust patents; and (5) that before filing or during pendency of this suit the plaintiffs, except Carrie Pierce McCoy, Genevieve Pierce and Anna Pierce, had likewise satisfactorily adjusted their selections.

3. *The facts as to alleged delays in issuance of patents to appellees' nonconflicting selections.*—Appellees (Br. 4–5) charge that the Secretary "failed and refused to approve said non-conflicting selections and to issue trust patents for the lands embraced in said selections to the Indian plaintiffs entitled thereto." This charge is unfair because, as will now be shown, the delay in issuance of the patents was due to the fact that the Secretary accorded them a privilege which they themselves asked for.

The only official schedule on which any selections for appellees appeared was Schedule No. 3 prepared by the allotting agent. Their selections thereon included those portions of their selections appearing on the Clark schedule which were not in conflict and other selections made for them by the allotting agent in lieu of their conflicting selections (R. 232–233). Instead of accepting the selections appearing on Schedule No. 3 or making other selections of their

own they chose to appeal to the Secretary (R. 233). On February 1, 1950, the Secretary held against appellees with respect to their conflicting selections, appearing on the Clark schedule, approved the balance of the selections by other Indians on Schedule No. 2 which had been held in abeyance, also approved some selections by other Indians on Schedule No. 3, and said as to appellees and others similarly situated at the time (R. 26; Plaintiffs' Exhibit No. 57):

> As the Indians (13 in number) for whom the remaining selections appearing on Schedule No. 3 were made have refused to accept those selections and have asked, in the event of a decision adverse to them in this appeal, that they be accorded the right to make for themselves new selections (see Mr. Clark's letter dated July 6, 1949, bottom of p. 8), action on the selections made for them on Schedule No. 3 is suspended in order to afford them that privilege. Accordingly, the case, as to them, is remanded to the Commissioner of Indian Affairs with instructions to cause to be served on each of them (or on the heirs of any deceased Indian) a written notice affording the Indian an opportunity, within not to exceed 10 days from the date of receipt of the notice, either to accept the selection made for them on Schedule No. 3, or to make a lieu selection of other available tribal land. The responses to these notices should be forwarded to the Department for such further action as may appear to be necessary.

The allotting agent by registered mail advised appellees of their rights (R. 27; Plaintiffs' Exhibits Nos. 59,

60, 61, 62 and 63), but their only answer was the filing of this action (R. 27).

And, as pointed out in the Government's Opening Brief (pp. 13–14), none of appellees up to the time of trial in June, 1953, had made the required written request that trust patents for the nonconflicting portions of their selections be issued or that the income therefrom be paid to them (R. 166–167, 172–176, 192–193). Hence, trust patents had not been issued for the nonconflicting portions of their selections because of their own failures and because of the administrative practice of issuing to each allottee but one trust patent covering the three tracts in his allotment (R. 165–166). And appellees cannot deny that, when they made proper written requests after the close of the trial, they seasonably received trust patents dated March 23, 1954, for the nonconflicting portions of their selections, that they have been paid by the Government that portion of advance rentals attributable to the period beginning on March 23, 1954, and that they themselves have been collecting rents due and payable since that date.[12]

4. *The facts as to alleged delay in equalization of allotments and apportionment of water.*—Appellees (Br. 5–6) have also referred to the failures of the government officials to apportion water and equalize allotments and state (Br. 6) that even up to the time this suit was filed "no action had been taken by the

[12] Likewise, they cannot deny that, when they abandoned their cross-appeals and either accepted the selections made for them by the allotting agent or made lieu selections, they received trust patents covering the balance of their allotments.

Bureau or by the Secretary to correct them. Indeed, the appellant expressly or tacitly admits that it has taken no action in respect to the matters mentioned, and in effect argues that all such matters are exclusively within the discretion of the Secretary and that the courts have no jurisdiction to adjudicate the rights of the Indians in respect to the income from allotted lands, or to adjudicate their rights in and to the waters of the reservation, or to equalize the allotments * * *." This statement misrepresents both the facts and the Government's position.

Far from either expressly or tacitly admitting that no action has been taken in respect to the payment of the rental income or the equalization of allotments, we assert that the Government has done everything possible as to these matters within the limitations imposed by the existence of litigation.[13] The failure to apportion water as desired by appellees is more fairly explained by reason of the opinion of the Secretary that such action was not only not necessary to protect the

[13] We have already reiterated (*supra*, pp. 11–13) the facts as to the partial payment of the income, and the reasons for the delay in such payment and for the nonpayment of all of the income claimed by appellees. In our opening brief (pp. 14, 26, 33), we pointed out that the Secretary had recognized the necessity for equalizing allotments and had issued instructions in regard thereto, but had directed that equalization be deferred until after primary allotments had been made to all members of the band. We leave to this court the question whether such deferment of equalization was reasonable. We also point out that since the dismissal of appellees' cross-appeal in June, 1955, and their making of lieu selections for their primary allotments, the matter of procedures for the equalization of allotments as equitably and fairly as possible has been receiving active consideration in the Department of the Interior.

Indians' rights but also not authorized by Congress. See Government's Opening Brief, pp. 15–16, 29–32, 42–44; *infra,* pp. 24–27. There is thus no basis for the view that except for court intervention no action will be taken as to these matters. Our view as to the proper scope of the court's jurisdiction in this connection will be reiterated in the *Argument, infra,* pp. 16–19.

5. *The Government does challenge what appellees call the "Pertinent Findings."*—Appellees (Br. 6–7) quote those portions of the court's findings of fact relating to the income from the nonconflicting selections, the equalization of allotments, and the apportionment of water, and then state (Br. 8):

> The brief of appellant does not challenge the sufficiency of the evidence to support the foregoing and other findings of the District Court. Moreover, the evidence fully supports said findings and appellant's brief tacitly, if not expressly, admits the sufficiency of the evidence in that respect.

This statement, we submit, is not a fair analysis of the Government's opening brief.

A reading of those portions of the findings quoted by appellees (Br. 6–7) will reveal that for the most part they are conclusions of law rather than findings of fact. Indeed, in its conclusions of law the district court repeated these findings almost verbatim (cf. Finding XXIII, R. 135, with Conclusion XII, R. 139–140; Finding XXIV, R. 135–136, with Conclusion XIII, R. 140; and Finding XX, R. 134, with Conclusion XXI). And we so characterized the "findings" (Opening Br. 14, 15, 16, and especially pp. 25–26).

368992—55——3

And, insofar as the quoted portions may be considered as true findings, we did challenge the accuracy of the "findings" that the Secretary was remiss in his duty to equalize allotments and to apportion water (Opening Br. 25–26, 43–44). However, quite reasonably we placed more stress on the inaccuracy of the "findings" with respect to payment of income and apportionment of water as conclusions of law (Opening Br. 36–44). Here again appellees' assertion simply ignores that portion of our brief dealing with these matters.

ARGUMENT

I. The District Court had no jurisdiction to make declarations as to the Indians' rights to an accounting for income, the equalization of allotments, or the apportionment of tribal water

Appellees' answer (Br. 11–18; see also Br. 5–6) to the Government's first point of argument (Government's Opening Br. 21–36) completely ignores the fact that the Government's basic jurisdictional contention is, and has always been, that *under the circumstances here present* the district court had no jurisdiction *under the 1894 Act* to make declarations as to appellees' rights to the accounting for income, the equalization of allotments and the apportionment of water. In other words, appellees' argument completely ignores the very pertinent facts (1) that only portions of their selections had been denied by the Secretary and that the Secretary's action in rejecting these conflicting selections was approved by the court below; (2) that the Secretary had not denied those selections by appellees as to which there were no

conflicts, but rather had issued trust patents therefor as soon as proper request had been made for such action; and (3) that appellees had made no requests for specific lands for equalization purposes, no requests for income, and no requests for a specific allocation of the tribal water (*supra*, pp. 11–15; Government's Opening Br. 10–16, 22–23, 25, 27–33). It is upon these facts, not abstractly or upon some hypothetical facts assumed by appellees (Br. 14), that the question of jurisdiction is to be determined. And the question is the jurisdiction of a suit against the United States under the 1894 Act, not of a mandamus action against a government official or some other form of action.

It is plain that under the facts as they exist appellees' reliance upon "general equitable jurisdiction" is of no avail. It is axiomatic that courts have no jurisdiction to grant relief from administrative action until administrative remedies have been exhausted. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–52 (1938). Thus, it follows that, since proper requests had not been made to the Secretary for the issuance of trust patents covering the nonconflicting selections, for the payment of income, for equalizing allotments or for the allocation of water, there was no independent basis for adjudication of these issues under the 1894 Act. *Reynolds* v. *United States*, 174 Fed. 212, 213–215 (C. A. 8, 1909).[14] And the adjudication of these

[14] In the *Reynolds* case suit was brought under the 1894 Act to obtain an adjudication in the abstract that plaintiffs were entitled to allotments, they having made no selections of specific lands. The complaint was dismissed without prejudice, the Court saying of the 1894 Act (174 Fed. at pp. 214–215) :

matters can not here rest upon "general equity jurisdiction." For, while the court below had jurisdiction to determine appellees' rights to their conflicting selections, such jurisdiction was exhausted when this matter was determined adversely to appellees. There was then no basis for retaining jurisdiction to determine other incidental rights, for in the very nature of things appellees had to return to the administrative agency and make new selections. Until this administrative process is completed, it would be unseemly for a court to interfere in any way. This reasoning, moreover, is in full accord with the principle that the equity court's right to adjudicate incidental issues is limited to those cases in which equitable relief has actually been administered or in which the jurisdiction has been rightfully invoked. 30 C. J. S. Equity, sec. 67, p. 419; 19 Am. Jur., Equity, sec. 132. And in *Arenas* v. *United States,* 197 F. 2d 418, 420 (C. A. 9, 1952), ignored by appellees, this Court held that the authority of an equity court to decide incidental issues did not empower the court to determine Indian heirship.

And there is nothing to the contrary in this Court's opinion in *Arenas* v. *Preston,* 181 F. 2d 62 (C. A.

"We think the proceeding in court was intended as a remedy when the position of the officials is adverse, which does not relieve the claimant of his duty to first localize his claim by a selection of specific land, so that, if final decree is rendered in his favor, all controversy will be at an end, and the Secretary of the Interior can cause a patent to be issued without further inquiry. In *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039 [relied upon by appellees (Br. 13)], which was brought under the Act of August 15, 1894, before the amendment of February 6, 1901, the claimant had made a selection of specific land." Appellees have cited no case to the contrary.

9, 1950), certiorari denied, 340 U. S. 819. In that case Arenas had made a selection which had been denied, so that there was room for the exercise of "general equity jurisdiction" after holding that an allotment had been unlawfully denied. But in the instant case there was not the necessary holding that valid selections had been unlawfully denied. And quite clearly the declarations that appellees were entitled to equalization of allotments, payment of income and apportionment of water can not, as the 1894 Act requires, "have the same effect * * * as if such allotments had been allowed and approved" by the Secretary. For, in each instance further consideration and action is required of the Secretary, as is well illustrated by the retention of jurisdiction to effectuate the judgment in these respects (R. 147–148). We submit therefore that, apart from any other reasons why jurisdiction was lacking,[15] the court below had no jurisdiction to make declarations as to the equalization of allotments, the payment of income or the apportionment of water because these matters had not been properly submitted to the Secretary in the first instance. Moreover, until such submission there can be no "case or controversy" appropriate for submission to a federal court.

---

[15] In our Opening Brief (pp. 27–33) we set forth additional reasons why the court below had no jurisdiction to make declarations as to the three matters involved in this appeal. Appellees have made no answers to these additional arguments and we submit that there are none.

II. Even assuming the existence of jurisdiction the District Court erred in holding that plaintiffs were entitled to the income derived from the lands included in their nonconflicting allotment selections from the dates of their selections

Whether or not appellees are entitled to the income from the lands included in their nonconflicting selections for the period prior to issuance of trust patents would depend, of course, upon the time at which they acquired the "full" equitable title in the land and the tribe's right was completely extinguished. In our opening brief (pp. 36–38), relying upon the language of the Mission Indian Act of January 12, 1891, 26 Stat. 712, that the issuance of a trust patent shall "separate the individual allotment from the lands held in common," we contended that, no matter what equitable rights appellees had acquired in the lands by virtue of selection,[16] the tribe rather than the individual Indian was entitled to the income for the period prior to issuance of the individual trust patent. We also distinguished the cases on which the district court relied for its holding that full equitable title vested in appellees as of the date of their selections, and cited *United States* v. *Reynolds,* 250 U. S. 104, 108–109 (1919), as authority for our distinction (see Government's Opening Br. 37, 38–42). Appellees pay little regard to the language of the Mission Act (Br. 21–22), brush off the opinion in the *Reynolds*

[16] We did not contend, as appellees assert (Br. 21) "that an Indian can acquire no rights in lawfully selected lands until a trust patent thereto is issued to the Indian." Of course, by virtue of a valid selection the Indian obtained the right that the land not be granted to another, and perhaps many other rights. We merely contended (Br. 38) that the Indian did not receive "full' equitable title until the issuance of the trust patent.

case as merely a holding that a restricted Indian cannot alienate his allotted lands during the trust period (Br. 22), and in a boot-strap argument cite several cases in the line distinguished in the *Reynolds* case as authority for their contention that equitable title to an allotment vests as of the date of selection (Br. 17, 19–20, 23). But the *Reynolds* case cannot be so lightly brushed aside.

The *Reynolds* case is more than a holding that restricted Indian lands cannot be sold during the trust period. In fact, that well established principle of law was not at issue in the case, the question at issue and decided being whether the trust period began with the approval of the allotment or with the issuance of the trust patent (250 U. S. at p. 107).[17] And the holding of the *Reynolds* case clearly is that under the General Allotment Act an Indian's equitable title was not complete upon approval of the allotment by the Secretary, but rather became complete only upon issuance of the trust patent (250 U. S. at pp. 108–

[17] Appellees (Br. 22) recite the facts that in the *Reynolds* case the selection was approved on September 16, 1891, and that the trust patent was issued on February 6, 1892, apparently to show that the difference in time was *de minimus*. The date upon which the Indian made the selection does not appear, but the schedule upon which the selection was listed was dated August 7, 1891. *Reynolds* v. *United States*, 252 Fed. 65, 66 (C. A. 8, 1918). The selection must have been made at some time prior to the latter date. But the interesting factor is that the date of selection, whether it was recent or long past, was not considered to be of any importance in determining when the Indian's equitable title vested (cf. Appellees' Br. 21–22). Moreover, as has been pointed out, *supra*, pp. 11–13, the delay in issuance of trust patents in the instant case was due to appellees' failure to follow the directions of the Secretary and his subordinates.

109). It is conceded that the *Reynolds* case did not involve the right to income, but it did involve the question as to when the equitable title became complete, which should in turn determine the right to income. As the Court of Appeals for the Eighth Circuit said of the *Reynolds* case in *Lemieux* v. *United States,* 15 F. 2d 518, 522 (1926), certiorari denied, 273 U. S. 749:[18]

> While not directly in point here, it is an intimation, at least, that the vesting of rights to lands in such a case does not take place upon the making of a selection or the issuance of a certificate of selection by an agent.

We submit that the *Reynolds* case is more than an intimation, it is a holding that complete equitable title under the General Allotment Act, which is not as clear in this respect as the Mission Indian Act, does not vest until a patent issues.

Likewise of no help to appellees is their quotation (Br. 20) from *Raymond Bear Hill,* 52 L. D. 688, 691 (1929). As indicated by the part of the opinion immediately preceding the quotation, the writer of the opinion was discussing the *general* rule as to the right of a claimant to public lands. However, it was later in the opinion recognized (52 L. D. at p. 692) that the Supreme Court's decision in *United States* v.

[18] It is interesting to note that the cases upon which appellees rely (*First Nat. Bank of Decatur, Nebr.* v. *United States*, 59 F. 2d 367 (C. A. 8, 1932); *United States* v. *Whitmire*, 236 Fed. 474 (C. A. 8, 1916); and *Wallace* v. *Adams*, 143 Fed. 716 (C. A. 8, 1906), affirmed, 204 U. S. 415), were decided by the same court. Obviously, the differences in the applicable allotment statutes must make a difference in the result.

Reynolds, 250 U. S. 104 (1919), must be respected in determining when equitable title to an allotment vested. And the holding that selection alone served to change the status of the land from tribal to individual property under the allotment act there involved could not be made with reference to the Mission Indian Act which specifically provides that only the issuance of the trust patent "shall separate the individual allotment from the lands held in common."

Appellees (Br. 21) also rely upon this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730, 750 (C. A. 9, 1946), certiorari denied, 331 U. S. 842, as authority for the contention that equitable title became vested upon selection. But as pointed out in the Government's Opening Brief (p. 37, fn. 13), that case did not involve the question of a right to income, the main question being whether Arenas was entitled to a trust patent at all, with the effective date of the trust patent being of little or no importance. Moreover, while the 1927 allotment instructions, involved in the *Arenas* case, called for the issuance of a certificate of selection for allotment, there was no such provision in the instructions here involved. Rather, the present instructions provided that the trust patents to be issued "shall be effective as of the date of the issuance thereof" (R. 196; see Government's Opening Br. 37, 41–42). Finally, we submit that the decision in the *Arenas* case is in no sense *res adjudicata* of the present issue, so that if it has the effect claimed by appellees it should not be followed here. Cf. *Arenas* v. *United States,* 197 F. 2d 418, 420–421 (C. A. 9, 1952).

III. Even assuming jurisdiction exists the court erred in holding that it was the duty of the Secretary of the Interior and the United States to apportion or allot the tribal water among the individual Indians

In their third point of argument (Br. 24–30) appellees indiscriminately mingle jurisdictional arguments and arguments on the merits. Their jurisdictional contentions are for the most part based upon factual situations that do not exist, and we shall rest upon what we have already said as to the lack of jurisdiction (*supra,* pp. 16–19; Opening Br. 21–27, 29–32, 33–36), merely reiterating that there have been no complaints from any of the Indians as to the present system of distribution of tribal waters (R. 171–172, 177, 180, 182–183, 259) and that, as the court found (R. 127), the reservation lands are valuable for resort purposes, which value would, of course, preclude agricultural use (cf. Appellees' Brief 24–25, 28).

Contrary to the implication of appellees' assertions (Br. 24, 26, 27), our argument on the merits and also our jurisdictional argument (Opening Br. 29–32, 42–44) can in no sense be characterized as a denial that each Indian is entitled to a fair share of the tribal water, or a contention that the Secretary's discretion under Section 7 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. sec. 381, is absolute. We freely admit the right of each Indian to the use of a fair share of the tribal water and the duty of the Secretary to distribute such water equitably when its use is necessary to make the lands available for agricultural purposes. But we do contend that there is no authority, under 25 U. S. C. sec. 381 or any other statute for *apportioning or allotting* the

tribal waters *in specific amounts* among the individual Indians (Opening Br. 29–32) and that the Secretary was not remiss in his duties under 25 U. S. C. sec. 381 in respect to the *distribution* of tribal waters.

Appellees (Br. 28–29) take issue with our distinction between "apportionment" or "allotment" and "distribution," and assert that the dictionary meaning of the words is the same. But regardless of dictionary definitions, which are often of no value in defining terms in Indian land law (cf. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. A. 10, 1943)), the General Allotment Act (of which 25 U. S. C. sec. 381 is the codification of a part) makes it clear that Congress was not using the terms "allotment" and "distribution" as synonomous. Rather, Congress plainly has directed the allotment of lands in the sense of a transfer of title to the Indians, but in section 381 has merely declared a right in each individual allottee of lands to share in the use of tribal water, title to the water rights to remain undisturbed, and has directed the Secretary to see that the water was equally distributed for agricultural purposes.[19]

[19] Obviously, since 25 U. S. C. sec. 381 authorized the Secretary to prescribe rules and regulations for the distribution of water only "where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes," the allotment or even distribution of water cannot be deemed part of the original allotment process (cf. Appellees' Br. 25–28). Congress knew that the condition imposed for action by the Secretary might not arise at all. And if the distribution of water was merely a part of the process of allotting land, there would be no need at all for section 381. Thus, appellees would in effect read the section out of the General Allotment Act. And they would negate the will of Congress to treat the water situation differently from the land itself.

Based upon the assumption that the terms "apportion" and "distribute" are synonomous, appellees (Br. 29) consider the judgment as merely a declaration that the right to a just share of the tribal water is appurtenant to each allotment and that appellees are entitled to have the waters distributed in such manner as will secure to each of them a just share. If that were the effect of the judgment, the Government would not be greatly disturbed. But the judgment did not use the term "apportionment" as synonomous with "distribution." Rather, the court was using "apportionment" in the sense of allotment and grant of title, as is demonstrated by its conclusion of law No. XX (R. 142–143; see also Conclusion XXI, R. 143):

> * * * and whenever it appears that the Secretary has failed or refused to perform this duty or has otherwise abused the discretion thus reposed in him by law, this Court has jurisdiction under 25 U. S. C. sec. 345 to adjudicate the resulting controversy between the Secretary and the allottees, *by decreeing the precise nature and extent of all water rights appurtenant to and accompanying allotments of tribal land;* and such decree "shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * * [25 U. S. C. sec. 345; * * *]

And in keeping with their fallacious line of argument appellees have suggested (Br. 5–6) that they might be satisfied with the inclusion in the trust patents of a provision that they were "entitled to just and proper shares of the reservation waters." They

also offered this suggestion in the trial court, but, as we have shown (*supra,* p. 26), the court's judgment is not in any sense an adoption of the suggestion. Moreover, the adoption of such a procedure would present jurisdictional obstacles. Congress has not authorized the inclusion of any such provision in a trust patent, so that neither the Secretary nor the courts could insert such provision even if it were deemed necessary. *Deffeback* v. *Hawke,* 115 U. S. 392, 406 (1885); see Opening Br. 31. And such a provision is not necessary since, even without it, an allottee is nevertheless entitled to his fair and just share of the water. *United States* v. *Powers,* 305 U. S. 527, 531–533 (1939); see Opening Br. 32. Thus, even if the inclusion were authorized, the omission of the provision would not support a finding that the Secretary was remiss in his duty.

The assertion at the end of appellees' brief that, while only a few Indians are here concerned the whole band "as a class" is interested in a judicial declaration concerning income, equalization and apportionment of water (Br. 30) requires comment lest other proceedings in the district court be inadvertently affected. The district court has held that this is not a class action (Conclusions XXI, XXII, R. 143). Appellees' attorneys have sought to join all of the members of the band as parties to supplemental proceedings in the present case claiming attorneys fees (Government's Opening Br. 34–35). Any statement that this is a class action would obviously advance such a claim. We therefore present in the Appendix hereto a statement of the reasons why the district court was

clearly correct in holding that this is not a class action.

CONCLUSION

For the reasons stated herein and in our Opening Brief, it is submitted that the judgment of the district court should be reversed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.
LAUGHLIN E. WATERS,
United States Attorney, Los Angeles, California.
ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington 25, D. C.

DECEMBER 1955.

APPENDIX

Statement of Reasons Why District Court Was Correct in Holding That This Is Not a Class Action

In their quotation of Finding XX (R. 134) appellees (Br. 7) have indicated by asterisks the omission of the following:

> * * * but only a few members of the Band are parties to this action, and it appears that all members, if practicable, should be joined as parties to any action for equitable apportionment of the water rights appurtenant to the allotted lands.

This statement is repeated verbatim in the court's conclusions of law (Conclusion XXI, R. 143) which then continues (Conclusion XXII, R. 143):

> Since plaintiffs here cannot represent the interests of the unjoined members of the Band because of their conflicting claims to allotments [see *Hansberry* v. *Lee,* 311 U. S. 32, 44–45 (1940)] and, the membership being relatively small, all could be joined as parties to an action, there is no basis for considering the case at bar to be a class action [Fed. Rules Civ. Proc., Rule 23 (a), 28 U. S. C. A.].

We will concede that each member of the Agua Caliente Band is vitally interested in the final decision in this litigation, just as any person would be interested in any litigation which as *stare decisis* would have an effect on his property and rights. But we can in no sense agree that each member has the same interest as do the appellees in this case. Indeed, it is clear that the interests of a majority of

the members of the band would lie in the reversal of the present judgment in one or all of its aspects. For example, those Indians who have trust patents for allotments with a comparatively high value, including Genevieve Pierce and Anna Pierce, appellees,[1] would no doubt prefer that there not be any equalization of allotments, but that the income from the remaining tribal lands would continue to be available as the source of monthly per capita payments. Likewise, those Indians still of childbearing age would doubtless prefer that the remaining lands be held for the making of allotments to children to be born in the future, with the result that their family holdings would have a greater increase than would result from equalization. Obviously, there is a conflict of interests flowing from the requirement that allotments be equalized.

It is likewise obvious that there is a conflict of interests with respect to the payment of income derived from allotted lands prior to the issuance of trust patents. It is a fact that each member of the band, including appellees, has received the income from the lands allotted to him or her attributable to the period after the issuance of a trust patent. No Indian has received income for any prior period unless he was, by virtue of a certificate of allotment issued in 1927, in possession of the land allotted to him and was him-

[1] In the petition for Supplemental Decree for Attorneys' Fees and Expenses Advanced, etc., filed by the attorneys for appellees in the district court it is recognized that, even though some allotments are valued far in excess of $100,000.00, it would not be practical to attempt equalization on a higher basis than $100,000.00 (see R. 230–231). Thus, although the petition lists the values of the allotments of Carrie Pierce McCoy, Anna Pierce and Genevieve Pierce at $63,730.00, $128,740.00, and $153,170.00, respectively, it is acknowledged that only Carrie Pierce McCoy would be entitled to a supplemental allotment for purposes of equalization.

self responsible for the production of income. Rather, it may be generally stated that the income derived from the lands prior to the issuance of individual trust patents has either been paid equally to each member of the band, including appellees, in the form of per capita payments, or has, since the filing of this suit been held in escrow pending judicial determination of the matter. The allotment selections were made in November and December, 1948 (R. 128–129). Trust patents were issued to 27 members of the band in February, 1949 (R. 212, 223, 226) and to the remaining members (except appellees Genevieve Pierce, Carrie Pierce McCoy and Anna Pierce) in February, 1950, or comparatively soon thereafter (R. 129–132).[2] Appellees themselves would doubtless have received trust patents in February, 1950, or earlier, if they had chosen to abandon their position, held to be untenable by the court below, as to their conflicting selections. Thus, it is their own fault that their trust patents were not issued at an earlier date (see also *supra,* pp. 11–13). And since appellees have shared equally with the other members of the band the income derived from other allotments from the time of selection to the issuance of trust patents, the other allotees cannot be expected to look with favor upon the holding below, especially when the affirmance of the holding would mean that the per capita payments would have to be reduced, or even eliminated, until appellees had been paid the amount of income derived from their allotments during the period at issue. Plainly, only appellees would gain under the holding as to payment of income.

---

[2] Trust patents were issued for the other appellees as follows: to Elizabeth Pete on June 29, 1950; to Marcus Pete, Jr., on December 21, 1950: and to Ruth Carmichael, nee Urton, on October 9, 1952 (R. 44–45, 48, 133). The Pierce sisters received patents for their nonconflicting selections on March 23, 1954 (Gov. Br. 14, fn. 14).

It is also plain that there would be no unanimity of opinion with respect to the requirement of the judgment that the tribal waters be apportioned among the individual Indians. Some, if not most, of the members of the band might prefer that the waters of the reservation remain in tribal ownership, with, as in the past, a right in each to the use of his just share. Indeed, 15 members of the band actually joined in making a group selection of lands including the main source of the tribal water, the lands so selected to be held in trust for the benefit of the entire band (R. 220, 224–225, 234). Obviously, these Indians considered it better that the tribal waters be retained in a unitary holding.

Thus, it is clear that the instant case, far from being properly labeled as a class action, presents a sharp conflict of interests between the members of the band as to each of the three questions presented on appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1955

No. 14672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANDELARIO A. AGUILAR,

Appellant,

vs.

UNITED STATES OF AMERICA and FRANCES G. AGUILAR,

Appellees.

Appeal from the United States District Court for the District of Arizona

Brief of Appellee Frances G. Aguilar

FLYNN, VAN HAREN & STEWART
By: ART VAN HAREN, JR.
404 Mayer-Heard Bldg.
Phoenix, Arizona
Attorneys for Appellee,
Frances G. Aguilar

McGREW COMMERCIAL PRINTERY, PHOENIX, ARIZONA

FILED
APR 15 1955
PAUL P. O'BRIEN, CLERK

INDEX

SUBJECT INDEX

Subject — Page

Argument:

Argument Appellant's Specification No. I........ 4

Argument Appellant's Specification No. II...... 4

Argument Appellant's Specification No. III.... 5

Argument Appellant's Specification No. IV...... 5

Argument Appellant's Specification No. V 5

Argument—Summary 4

Argument—General 8

Conclusion 15

Jurisdiction 2

Statement of the Case... 3

TABLE OF CASES

Page

Butler v. Butler, 177 Fed. (2d) 471, 5th Cir. 1949.... 14

Bradley v. United States, 143 Fed (2d) 573, 10 Cir. 7, 13

Collins v. United States, 161 Fed. (2d) 64, 10 Cir. 1947 ....6, 8, 15

Downing v. Downing, 175 Fed. (2d) 40 7

Egleston v. United States, 71 Fed. Sup. 114 at 116.. 10

Gann v. Meek, 165 Fed. (2d) 857, 5th Cir............. 14

Kendig v. Kendig, 170 Fed. (2d) 750 9th Cir. 1948 ....7, 8, 10, 15

McKewen v. McKewen, 165 Fed. (2d) 761 6
Mitchell v. United States, 165 Fed. (2d) 758 12
Senato v. United States, 78 Fed. Sup. 536 at 538 9
Scott v. Johnson, 71 Fed. Sup. 114.4 12
Walker v. United States, 70 Fed. Sup. 422 at 425 11

FEDERAL STATUTES CITED

Page
Title 38 U.S.C.A. Ch. 13 .... 2, 3
Title 38 U.S.C.A. 817 3
Title 38 U.S.C. Ch. 10 3
Title 38 U.S.C.A. 445 3
Title 38 U.S.C.A. section 802-G 6

OTHER INDEX OF AUTHORITIES CITED

Rules of Practice of United States Court of Appeals for the Ninth Circuit, Rule 18, Section 3 2
Rule 2 A.L.R. (2d) 509 6
Rule 18 2b—Rules of Practice of United States Court of Appeals for the Ninth Circuit 2
Rule 52 Federal Rules Civil Procedure, 28 U.S.C.A. following section 723-C 6
1954 Yale Law Journal 451 13
2 A.L.R. (2d) 498-499 13

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CANDELARIO A. AGUILAR, *Appellant,* vs. UNITED STATES OF AMERICA and FRANCES G. AGUILAR, *Appellees.*	No. 14672

Brief of Appellee

Frances G. Aguilar

In this brief the parties will be referred to as they were referred to in Appellant's Brief, viz: Candelario A. Aguilar, as Appellant and Frances G. Aguilar as Appellee. Reference to the printed transcript of record will be indicated by the letter "T" followed by numerals denoting the page number.

JURISDICTIONAL FACTS

Appellee, Frances G. Aguilar, desires to state and add Jurisdictional Facts because the Rules of Practice of United States Court of Appeals for the Ninth Circuit, Rule 18, Section 3, specifically states that the Brief of the Appellee shall be of like character with that required of the Appellant, except that no Specification of Error shall be required, and no Statement of the Case, unless that presented by the Appellant is controverted. The Appellee desires to add Jurisdictional Facts so that the Court may be informed in more detail in complying with the Rules of Practice of the United States Court of Appeals having in mind Circuit Rule 18, Section 2-B wherein it states "a statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree or order in question . . . ".

The Appellant, Candelario A. Aguilar, filed his claim for the insurance in question with the Veterans' Administration for the proceeds of said insurance policy. The Appellant's claim to such proceeds was disallowed by the Administration of Veterans' Affairs and after a thorough investigation and review his claim was disallowed by the Board of Veterans' Appeals, which is the duly qualified Board to hear disputes of this matter; his claim was denied on April 17, 1953. (T pages 7-8-9).

This action was then instituted by the Appellant in the United States District Court for the District of Arizona under the provisions of the National Service Life Insurance Act of 1940 as amended. (Title 38 U.S.C.A. Ch. 13). (T page 1).

Appellate jurisdiction is conferred upon this Court and the trial jurisdiction upon the United States District Court for the District of Arizona by Ch. 13, Title 38 U.S.C. (38 U.S.C.A. 817 and Ch. 10 Title 38 U.S.C.), (38 U.S.C.A. 445).

STATEMENT OF THE CASE

Appellee, Frances G. Aguilar, incorporates in essence the Appellant's Statement of the Case but adds to the Appellant's Statement of the Case the following:

The veteran, Raymond R. Aguilar, and the Appellee, Frances G. Aguilar, were married on December 31, 1948 in Phoenix, Arizona. (T page 17). The veteran lived with his wife from the date of marriage to January 8, 1949 (T page 18), however the veteran involved in this matter and the Appellee were life-long sweethearts and there had been a long and extended courtship which the Appellant, Candelario A. Aguilar, well knew of. (T page 42, page 49). The Appellee states that there is no conflict, that the veteran made oral statements to his wife and others that he definitely intended to change the beneficiary of his insurance from the Appellant to his wife. These oral statements were made not only to his wife but to Palmara Gallardo and to Carlos R. Aguilar, who is the son of the Appellant Candelario A. Aguilar, but in spite of this, unequivocally and without any rebuttal or controversy of any type whatsoever testified as to the oral statements made by his brother Raymond R .Aguilar to him. These statements of intention were made to him; and irrespective of the relationship between this witness and the Appellant, Carlos R. Aguilar, testified honestly and straightforwardly concerning the intentions of his brother. (T pages 44-45-46).

In the trial of this matter a Report of Death was introduced by the Appellee and admitted in evidence for the consideration of the District Court. This Report of Death which is defendant's Exhibit C in evidence (T page 87) specifically shows the wife Frances G. Aguilar as the beneficiary. This Exhibit we must fairly assume was considered by the Trial Court sitting as a trier of facts along with all the other matters that have been set forth in the Satement of the Case by he Appellant.

SUMMARY OF ARGUMENT

The Appellant has set forth five (5) Specifications of Errors. We shall take up these matters in the same order in which they have been set forth by the Appellant.

No. I

The Trial Court did not err in finding as a fact (T pages 12-13) that plaintiff failed to introduce evidence in the support of the allegations of his complaint which would justify the entry of judgment in his favor. The Trial Court found as a fact that the necessary burden of proof was successfully carried by the Appellee. It was found as a fact that the burden of proof necessary was carried and as such controverted the evidence supporting the allegations of the Appellant's complaint.

No. II

The Trial Court did not err in finding as a fact that the Appellee, Frances G. Aguilar, introduced

sufficient evidence to support the allegations of her answer and to entitle her to judgment. The Trial Court after considering all of the evidence, both oral and documentary, did find as a fact that all of the evidence presented was sufficient to satisfy the burden of proof imposed by law upon the Appellee and as such the evidence presented was sufficient to support the judgment entered herein.

No. III

The Trial Court did not err in entering its Conclusions of Law (T pages 13-14) in that Conclusions of Law are in most instances derived from factual evidence and the Trial Court sitting as a trier of facts held that the evidence was sufficient, thereby the Conclusions of Law found are not in error.

No. IV

The Trial Court did not err in entering judgment for the Appellee herein for the reason that he did find as a matter of fact and there is sufficient evidence to sustain this finding that the insured veteran did so intend to change the beneficiary of his policy of insurance and the Trial Court did find as a matter of fact and there is sufficient evidence to sustain this finding that the necessary affirmative acts were shown to give effect to such definite intention.

No. V

The Trial Court did not err in entering judgment in favor of the Appellee as said judgment is set forth on page 14 of the transcript of record in that after considering the facts and the Conclusions of Law thereto the judgment was the necessary result.

The Appellee in substance agrees with the Appellant that the burden rests upon one claiming as a substitute beneficiary that the insured during his lifetime effected a valid change. *Collins* v. *United States,* 161 F. 2d 64 (10th Cir., 1947); 2 A.L.R. 2nd, 509. However, this burden of proof has been found by the Trial Court to have been substantially and successfully carried by the Appellee. The District Court personally heard all of the evidence and facts and ruled on them; and as stated in *McKewen* v. *McKewen,* 165 F. 2d 761, "we should not disturb the findings and judgment of the Court below because there is substantial evidence to support his findings," (Rule 52 Fed. Rules Civil Procedure, 28 U.S.C.A. following section 723-C). This same case, supra, states "it was the primary function of the lower Court to draw all the inferences that were appropriate from the evidence in the case in an effort to ascertain the intent of the deceased soldier."

Chapter 38, U.S.C.A. Section 802-G, does grant the insured the right to change the beneficiary of his National Service Life Insurance subject to the regulations imposed by the Veterans' Administration; however, it has been ruled on many times that the technicalities required by the Veterans' Administration will be "brushed aside" and not considered in these particular cases. The manifested intent of the deceased soldier is the salient factor to consider as to whether or not a valid change of beneficiary was effected. It has been stated in many cases that the notices required by the Veterans' Administration will not be required if the manifestation of intent to change the beneficiary is shown to the Trial Court. In particular the McKewen case, supra, states in reference to this "requirement for written notice of change of beneficiary of National

Service Life policy is for benefit of insurer and may be waived by it." This particular case like many others went on to state that the Veterans' Administration Appeal Board in ruling for the Appellee can be fairly assumed as having waived the notice ruling.

The Appellee is in complete accord with the Appellant that the strict compliance with the administrative requirement as he has set forth in his brief is not required in order to effect a change of beneficiary. *Kendig* v. *Kendig* 170 F. 2d 750 (9th Cir., 1948). The Kendig case, supra, which is the ruling case of this 9th Circuit and which has been affirmed by *Downing* v. *Downing,* 175 F. 2d 40 gives great credence to the manifested intent of the deceased veteran. It states that the confidential statement signed in that particular case is the most important item of proof. This Court specifically laid down the rule that this stated confidential statement meant more than evidence of an unexecuted intent. It considered the stated confidential statement not only as manifestation of intent but as a substantial affirmative act on the part of the insured to evidence the exercise of such intention. This Court in distinguishing the Kendig case from *Bradley* v. *United States,* 10th Cir., 143, F. 2nd 573, stated that the Court in the Bradley case, supra, considered the statement there only from the standpoint of its representing in and of itself an attempt to effect the change. This Court considered all of the evidence presented in the lower Court and has stated that where there are numerous pieces of evidence both oral and documentary then they are worthy of showing a manifestation of intent and an affirmative act on the part of the insured to evidence the exercise of such intention. It is interesting to note that this Court stated in the Kendig case, supra, that the Veterans' Ad-

ministration, after investigation, had accepted the soldier's confidential statement as effecting a valid change of beneficiary. We believe it to be a fair assumption that this Court will give credence to the Veterans' Administration Appeal Board in that they are the investigative administrative body in the determination of these cases insofar as the insurer is concerned.

We are in accord with the Appellant that a mere intent alone to change the beneficiary is not sufficient, *Collins* v. *United States,* 161 F. 2d 64 (10th Cir., 1947). However, much more than a mere intent has been shown in the case at bar.

ARGUMENT

It is not the Appellee's contention or proposal that this Court adopt a rule that the beneficiary of a National Service Life insurance policy may be changed by evidence, oral and written, of a mere intent to make such a change. The case at Bar presents much more than a mere intent to effect a change. All the cases, and especially so in this particular district, state that the manifestation of intent to change the beneficiary by the veteran must be shown and some affirmative act must be shown. The leading case in this district is the Kendig case, supra. In that particular case the Court ruled that there was enough evidence of the manifestation of intent to change the beneficiary by the veteran and enough affirmative act to present that evidence to the jury, which was the trier of facts in that particular case. As we understand it, that case concluded that the Trial Court was in error in taking the case from the jury and that the jury was not to be prohibited from acting as the trier of facts. In the instant case this matter was tried before the lower Court. Evidence of the

manifestation of intent of the veteran to change the beneficiary to his wife was presented. Evidence of the required "some affirmative act" was presented. The lower Court sitting not only as the trial judge but as the trier of facts concluded that the evidence of both of these elements was sufficient to rule in favor of the Appellee. It is sound and substantiated law that an Appellate Court will not disturb the findings and the judgment of the Trial Court when there is substantial evidence to support the Trial Court's findings. The substantial evidence to support the findings of the Trial Court in the case at Bar is substantially the following:

Defendant's Exhibit A in evidence (T pages 79-83) specifically states in the past tense, "I changed everything over to your name. For instance my G.I. insurance and also you are the first one to be notified in case of emergency . . . . ".

Defendant's Exhibit B in evidence (T pages 84-86) reaffirms that manifested intent by stating "cause I already straightened everything out . . . . ".

In the case of *Senato* v. *United States,* 78 F. Supp. 536 at 538, in dealing with statements made by a veteran to his wife it states "as to the ensuing words the Government and the Plaintiff suggest—perhaps they later even argued—that this could have been an oblique expression intended 'to placate' his wife; i.e., to mislead her to the extent of saying one thing and meaning another. To so conclude would be to impute to nick a gift of duplicity, and to purpose to lie, for which we can find no support in the testimony. Nor should such a judgment lightly be passed upon one whose word as a soldier and whose makeup as a man seems to forbid the imputation of such a blemish to his character." In

the instant case Counsel for the Appellant did argue this by definite intimation. However, the entire transcript of record will show that the deceased veteran was the life-long sweetheart of the Appellee, that they were on the best of amicable marital relations, that defendant's Exhibit A in evidence (T page 79-83), defendant's Exhibit B in evidence (T page 84-86), shows the complete endearment that the deceased veteran held for his wife. In *Egleston* v. *United States,* 71 F. Supp. 114 at 116, the Court indicates by his statement that letters to a wife showing endearment are admissible and as such are to be considered. It states "one week before his death the soldier wrote in endearing terms to his wife, expressing all the love and affection for her that anyone could express." In consideration the exhibits and the entire transcript and the oral testimony which was propounded by Carlos Aguilar, the actual son of the Appellant, (T pages 43-44-45-46) and considering the testimony propounded by Palamara Gallardo (T pages 36-37-38-39-40) it is a clear assumption that the deceased veteran in the instant case held his wife in the closest of endearing esteem and as such recognized the "natural bounty of his affection" and as such very definitely manifested his intent to change his National Service Life Insurance policy by making her the beneficiary.

Having shown the definite manifestation of intent by the deceased veteran; what then is there to show the requirement of "some affirmative act?" The Appellee submits that the letters themselves are enough affirmative ast as required by the great majority of cases. In the Kendig case, supra, it was considered that the veteran's statements and the confidential statement signed with the aviation squadron was enough of "some

affirmative act'' to be considered and passed on by the jury. The confidential statement which was considered in that case was not by any means to be considered as any type of formal change or notice of beneficiary. It specifically stated that it was not to be opened until after the death of the deceased veteran. In the case at Bar we have specific letters which unequivocally state that the change of beneficiary had been made. Evidence was properly introduced of his proposed intention of changing the beneficiary to his wife. Further in the case at Bar there is a Report of Death which is defendant's C in evidence (T page 87). This Report of Death specifically states that the Appellee is the beneficiary.

In *Walker* v. *United States,* 70 F. Supp. 422 at 425, the Court states "I think it is clear that the insured gave the proper written notice of change of beneficiary either on forms generally used in the army or by letter or other memorandum and that for some reason, due perhaps to the confusion instant to war, such forms, letters, etc., were not available for production here. This view is strengthened by the fact that when the soldier was killed in action, his wife and not his his mother was notified and all of the other benefits like allotments, and so forth, have been paid to the wife.'' That case further states "an ordinary signed letter or memorandum containing sufficient information, is sufficient in war.'' "While the wife here has the burden to show such notice was given, the fact it was given may be given by circumstantial evidence.'' That same case, supra, is even more analogous to the case at Bar in that the District Court of the South District of Texas found that letters sent the wife by the insured, both while in the States and abroad, showed clearly that he intended his wife to be the beneficiary. The "Report

of Death" made by the Adjutant General of the War Department to the Veterans' Administration showed his wife as beneficiary. Some of the letters of the insured to his wife had indicated he had taken steps to change his beneficiary. The District Court concluded that the information regarding the wife being the beneficiary must have come to the War Department from the insured, and that circumstantial evidence showed that a change of beneficiary had been made. It is interesting to note in the case at bar that the Appellant's name was not mentioned whatsoever in the beneficiary section of the "Report of Death." He was not even mentioned as contingent or second contingent beneficiary. It is also interesting to note that by his own testimony (T page 77) the Appellant admitted that the deceased veteran would write to him but he never once mentioned anything about his G. I. Insurance.

In *Mitchell* v. *United States,* 165, F. 2nd 758, the Court states that it is not one piece of evidence standing alone but all the evidence together should be considered as to the manifestation of intent and the affirmative act required. It specifically states "the Court will brush aside technicalities." "It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal acthaving been done no change can be held to have been done, *is not to brush technicalities very far aside.*"

The Appellee submits that the Courts in these various cases do not require that the notice of the change of beneficiary be sent to the Veterans' Administration at any particular time. In the *Scott* v. *Johnson,* 71 F. Supp. 114.4 case, the Court states "it seems clear to me that the deceased did everything prior to his death

necessary to secure a change of beneficiary. His letter of August 27, 1942 is clear and explicit in this respect. There remained only the necessity of his wife forwarding this to the Veterans' Administration; instead of doing so she wrote a letter herself." In criticizing the Bradley case, supra, a note in 1954 Yale Law Journal 451 states that the doctrine upon which the Court's decision was predicated namely that although strict compliance with regulation is not necessary to perfect a change of beneficiary when the intent to change is clear, the insured must have done everything reasonably within his power to accomplish his purpose if equity is to heed it, as conflicting with the great majority of war risk insurances cases which allow reform of the policy upon proof of intent alone. (See 2 A.L.R. 2nd 498-499). The Appellant on page 12 of his brief points out to the court that in a record of emergency data, defendant's Exhibit D in evidence, (T page 88), there were written the words "I understand that this form does not designate or change life insurance policy beneficiaries and that any such designation or change can only be effected by separate action originated by me." It is a fair assumption that the deceased veteran would pay no heed to this particular wording in that on January 26, 1949 and again on February 2, 1949 the deceased veteran was of the belief that he had taken affirmative action to change the beneficiary over to his wife. The stated Record of Emergency Data was dated February 2, 1949, and it can certainly be considered that the deceased veteran if he did note this wording did not desire to change the beneficiary back to the Appellant.

The Appellee submits that it can in substance be agreed upon that all these cases involving National Service Life Insurance policies turn on their own par-

ticular facts and merits. The case of *Butler* v. *Butler,* 177 F. 2nd 471 (5th Cir., 1949), which it seems Appellant is almost exclusively relying upon, seems to be a definite example of that rule. The Court in that particular case seemed to turn its decision on the particular merits and facts of that particular case and specifically stated "there is not sufficient proof of the intent." The Court in the Butler case, supra, states that the *Gann* v. *Meek case* (5th Cir., 165 F. 2nd 857) is not being reversed by that particular Circuit, but that the two cases in question must turn on their own particular merits and facts. In the Gann case, the Court held that a definite manifestation of intent was shown in that the deceased veteran in that particular case did state "I did change my insurance." This is exactly what has taken place in the case at Bar. The Court in the Butler case, supra, certainly by very strong intimation and dictum stated that if there would have been complete and clear manifestation of intent then not so much is required as to the affirmative action. The Butler case, supra, at best—stands by itself and is not analogous to the case at Bar in that no such definite manifestation of intent was shown in that particular case and no "Report of Death" was submitted. It is not material or relevant that a small private insurance policy was changed over by the required methods of the private insurance company in the case at Bar. It can not be argued that two very different rules govern insofar as National Service Life Insurance and private insurance is concerned.

CONCLUSION

The Appellee has pointed out to the Court the various governing cases insofar as these matters are concerned. There are many more cases that can be submitted. However, it is the Appellee's belief that the Court is most familiar with the cases involved in these matters and it is not the desire of the Appellee to belabor the Court any further with further citation of cases. It is the Appellee's belief that this Court is exceptionally familiar with these matters in that the Kendig case, supra, and the Collins case, supra, were handed down as the law in this particular Circuit. The Appellee submits that this case is even stronger than the Kendig case. It is stronger in that evidence of the manifestation of intent to change the beneficiary has been passed on and evidence of some affirmative act has also been passed on, not only by the Trial Court in this particular matter, but by the authorized administrative investigative body. After very lengthy and thorough consideration by the foregoing investigative body and the Trial Court it was found as a matter of fact that sufficient manifestation of intent and an affirmative act were shown. The Kendig case, supra, states in essence that these facts should have been considered by the trier of facts, to-wit: the jury. The Appellee submits that the fact finders have passed on these elements and have found those facts in favor of the Appellee. It can not be assumed that only a mere intent to change the beneficiary was found. It must of necessity, and there is enough substantial evidence to warrant the finding of those facts, that the necessary elements were clearly shown. The Apellee submits that the facts have been passed on and that the Court correctly found his Conclusions of Law

thereto and that the Court correctly entered its judgment in favor of the Appellee. The judgment should be affirmed.

Respectfully submitted,

FLYNN, VAN HAREN & STEWART

By: Art Van Haren, Jr.
Attorney for the Appellee,
Frances G. Aguilar,
404 Mayer Heard Bldg.,
Phoenix, Arizona

No. 14677

In the

United States Court of Appeals

For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

SAM L. LEVINSON
EDWIN J. FRIEDMAN
LEVINSON & FRIEDMAN
Attorneys for Appellant

1602 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

FILED
APR 28 1955
PAUL P. O'BRIEN, CLER

No. 14677

In the

United States Court of Appeals

For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

SAM L. LEVINSON
EDWIN J. FRIEDMAN
LEVINSON & FRIEDMAN
Attorneys for Appellant

1602 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Page

Statement of Jurisdiction 1
Jurisdiction of the District Court 2
Jurisdiction of the Court of Appeals 2
Statement of the Case 3
Specification of Errors Relied Upon 7
Argument 8
Conclusion 37

TABLE OF CASES

Adams v. American President Lines, Ltd., 1944 A.M.C. 550 34
The Arizona v. Anelich, 298 U.S. 110, 80 L.Ed. 1075 .... 11, 12, 25
Bachman v. U. S. A., 72 F.Supp. 298 36
Bainbridge v. Merchants and Miners Co., 287 U.S. 278, 77 L.Ed. 302 12
Balado v. Lykes Bros. S. S. Co. (C.C.A. 2) 179 F. (2d) 943 .... 10, 20, 21, 24
Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 71 L.Ed. 1069 .... 13, 14, 15, 16, 17, 18
Becker v. Waterman Steamship Corporation (C.C.A. 2) 179 F.(2d) 713 .... 27, 35
Branick v. Wheeling Steel Corp. (C.C.A. 3) 152 F. (2d) 887 9
Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 62 L.Ed. 1171 .... 11, 25
Engel v. Davenport, 271 U.S. 33, 70 L.Ed. 813 12
Garrett v. Moore-McCormack Co., 317 U.S. 239, 87 L.Ed. 239 11
German v. Carnegie-Illinois Steel Corp. (C.C.A. 3) 156 F.(2d) 977 .... 10, 17, 18, 24
German v. Carnegie-Illinois Steel Corp., 75 F.Supp. 361 10
Hill, Jr., v. Atlantic Navigation Co. (D.C. Va.) 1954 A.M.C. 2150 23
International Stevedoring Co. v. Haverty, 272 U.S. 50, 71 L.Ed. 157 31

Page

Lewis v. Orion Shipping & Trading Co., 1953 A.M.C. 546 23
McCarthy v. American Eastern Corporation, 175 F. (2d) 724, cert. den., 338 U.S. 868, 70 S.Ct. 144, 94 L.Ed. 532, rehearing den. 338 U.S. 939 .... 10, 18, 24
McGhee v. U. S., 165 F.(2d) 287 20
The Moses Taylor, 4 Wall. 411, 18 L.Ed. 397 11
The Osceola, 189 U.S. 158, 47 L.Ed. 760 .... 11, 15
Pacific S. S. Co. v. Peterson, 278 U.S. 130, 73 L.Ed. 220 12
Panama Ry. Co. v. Vasquez, 271 U.S. 557, 70 L.Ed. 1085 11
Reed v. The Arkansas, 88 F.Supp. 993 .... 21, 22
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099 .... 8, 11
Skolar v. Lehigh Valley R. Co., 60 F.(2d) 893 20
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 25
Spangler v. Matson Navigation Co., 1950 A.M.C. 409 23
Thomsen v. Dorene B., 91 F.Supp. 549 22
Thurston v. U. S. (C.C.A. 9) 179 F.(2d) 514 .... 25, 28, 29
Van Camp Sea Food Co. v. Nordyke (C.C.A. 9) 140 F.(2d) 902 12
Delbert L. Williams v. Steamship Mutual Underwriters Assn., Ltd., 145 Wash. Dec. 191, 1954 A.M.C. 2006 .... 23, 24

STATUTES

Title 28, U.S.C.A., Sec. 1291 2
Title 28, U.S.C.A., Sec. 1331 2
Title 28, U.S.C.A., Sec. 1332 2
Title 46, U.S.C.A., Sec. 688 (Jones Act) 2, 9, 12
Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20) 11

In the

United States Court of Appeals

For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,* vs. TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*	No. 14677

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a merchant seaman, brought an action at law against the appellee in the United States District Court for the Western District of Washington, Northern Division, to recover damages for personal injuries sustained by him when he slipped and fell while engaged in the course of his employment on board a vessel owned and operated by the appellee. Appellant's complaint and appellee's answer have been superseded by a pretrial order, and only the pretrial order appears in the record on appeal (R. 3).

The case came regularly on for trial before a jury and before the Honorable George H. Boldt, a District Court Judge of the United States District Court for the Western District of Washington, Northern Division. The

jury returned a verdict for the defendant and a judgment on the verdict of the jury was duly entered (R. 9), and the court filed its decision denying the motion for a new trial (R. 12) upon which an order was duly entered (R. 17). Appellant has duly prosecuted his appeal to this court from the judgment.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28, U.S.C.A., Sec. 1331, granting District Courts' original jurisdiction of civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the laws of the United States; by the provisions of Title 28, U.S.C.A., Sec. 1332, which vests jurisdiction in District Courts in cases of diversity of citizenship and where the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs, and by Title 46, U.S.C.A., Sec. 688 (Jones Act) which vests jurisdiction in the District Court in cases thereunder.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of Title 28, U.S.C.A., Sec. 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decisions of the District Courts of the United States.

STATEMENT OF THE CASE

This is a seaman's action, on the law side of the court, brought to recover damages for serious and permanently disabling injuries sustained by the plaintiff while in the service of the defendant as maintenance man in the crew of the Tanker TIDEWATER (R. 72). Plaintiff's injuries were sustained on January 12, 1953, while the vessel was alongside a dock at Portland, Oregon (R. 47, 73, 171). Plaintiff at that time, pursuant to orders, was working with other members of the crew carrying a heavy hose from the port side of said vessel to its starboard side (R. 48). The area over which the men were working was located near its No. 2 tank on the forward part of the vessel (R. 48). Plaintiff had performed no duties in that section of the vessel that day prior to receiving his orders to help move the hose (R. 75). While he had washed out the after tanks of the vessel on the forenoon of that day (R. 75) other members of the crew had washed out the forward tanks while the plaintiff was at lunch (R. 81, 82). At the time of the accident the weather was misty and the decks were wet (R. 50, 81). Plaintiff and two other members of the crew picked up the hose in question (R. 49). Plaintiff was the last man on the hose and was carrying the end of the hose with a heavy flange attached to it on his right shoulder (R. 49, 97, 173). The other men led the way and plaintiff was required to follow (R. 98). Because of the manner in which he was required to carry the hose behind the other men he could not watch the deck (R. 99, 150), and because of the type of hose, could not follow directly in the path of the men who preceded him when the direction of their travel was

changed (R. 153). As the men proceeded across the deck plaintiff's feet hit an oily spot and he slipped and fell face down striking his head on the deck and with the heavy end of the hose dropping and striking him on the back of his neck (R. 50, 99). There was an oil spill at the spot where the plaintiff fell (R. 50, 177).

The main deck of the Tanker TIDEWATER was painted with a black hull paint not intended for use on deck (R. 31, 36, 101). No sand or other abrasive material was added to the paint in any manner (R. 32, 101, 179, 183) although this has been denied by defendant's witnesses (R. 220, 241, 262). The paint used on the TIDEWATER was normally slippery and became more slippery when wet (R. 228, 237). In the operation of tanker vessels it is expected that oil spills will occur on the deck and that deck paint will become impregnated with oil (R. 226). Extra precautions should therefore be taken in the maintenance of decks of tanker vessels as compared to the decks of dry cargo vessels (R. 38, 226). The normal and usual manner is for a specially prepared non-skid paint with an asphalt base to be used on the decks of tanker vessels (R. 30). These specially prepared paints have ingredients to prevent slipping. In the event that commercial non-skid paints are not used, sand or other abrasive materials are usually either mixed with the paint or are added to the surface of a freshly painted deck in order to provide safety for crew members (R. 166). Complaints had been made to the officers of the vessel with regard to the slippery nature of the deck and requests had been made that sand be added to the paint at the time of application or that a non-skid type

of paint be used (R. 32, 39). These requests had been denied (R. 32).

Because of the prevalence of oil spills on the main decks of tanker vessels and the danger to personnel of the vessel because of said spills, there was a standing order on board the vessel in question that all spills be immediately cleaned up at the time that they occur and that great care should be taken in that regard (R. 34, 236, 237, 269). The two members of the crew testified that plaintiff fell because of an oil spill that had not been cleaned up (R. 50, 177). Plaintiff testified that he fell because of an oily spot on the deck (R. 99). The accident report prepared by the second officer following the accident states as follows: "Slipped when carrying the slop hose along oily deck.—Fell flat.—Forehead hitting the deck—hose hitting back of head—hose on right shoulder." (Plaintiff's Exhibit 1, R. 44). This report was prepared on the day of the accident and was inserted in the rough log book of the vessel as a permanent record.

Defendant attempted to impeach plaintiff's witnesses Smith and Hamilton, with regard to the oil spill, by the use of prior inconsistent written statements (R. 60, 196). Any inconsistencies were explained by these witnesses (R. 64, 199). With regard to the oil spill, the defendant had no evidence to the contrary. Defendant's Captain Daly testified that he had made no inspection of the deck (R. 227). Defendant's second officer testified that he had made a casual inspection some time before the accident (R. 269).

A pretrial order was prepared before trial (R. 3). In

formulating the issues the court required the plaintiff to elect whether he would proceed under allegations of negligence or allegations of unseaworthiness and would not permit the plaintiff to proceed under both allegations (R. 8). Plaintiff excepted to the court's ruling and elected to proceed under allegations of negligence (R. 8). The case was presented to the jury under the theory of negligence only. The case was tried before Judge George H. Boldt and a jury and resulted in a verdict for the defendant. Plaintiff's motion for a new trial was denied.

The trial judge instructed the jury that in determining damages the law of comparative negligence must be applied (R. 298). Under this instruction the failure of the jury to bring in any verdict for the plaintiff was assigned as a reason in support of plaintiff's motion for a new trial in the court below (R. 10). The basis for this claim of error was that the evidence conclusively established the presence of oil and that from the testimony of defendant's own witnesses, the existence of an oily deck could only result from the negligence of the defendant or its employees, and that under the doctrine of comparative negligence plaintiff was entitled to a verdict as a matter of law.

There is also another issue before this court. During the course of his instruction to the jury the trial judge charged with respect to the presence of oil on the deck that in order to find the defendant negligent the jury must find that the defendant or its employees knew of the presence of the oil and that the defendant would not be liable for a transitory danger of such a condition

in the absence of actual or constructive knowledge of the existence of the same (R. 296). Plaintiff excepted to this instruction (R. 307).

SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in requiring the plaintiff to elect his remedy between negligence under the Jones Act and unseaworthiness under the general maritime law.

2. The verdict of the jury for the defendant cannot stand in a seaman's case where the jury has been instructed that the rule of comparative negligence must be applied, where the physical conditions which caused the plaintiff's accident are the result of defendant's negligence even though there is a charge of contributory negligence against the plaintiff.

3. Where the evidence established that a condition causing plaintiff's injuries could only be the result of negligence and the violation of a standing order on board the vessel requiring crew members to clean up any oil spill immediately after it occurs, prejudicial error occurred when the jury was instructed that the plaintiff must also prove that the defendant had notice of the oily condition with an opportunity to correct the same before the defendant would be held liable, as follows: (R. 296):

> "If you should find that the plaintiff was caused to fall by reason of an oily condition on the foredeck of the TIDEWATER, that fact would not of itself warrant you finding that the defendant was negligent. To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not

only that there was this oily condition which caused the plaintiff to fall, but also that the defendant or its employees knew or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it because the defendant is not liable for a transitory danger of such character in the absence of actual or constructive knowledge of the existence of the condition."

ARGUMENT

I. In a Seaman's Action for Damages at Law Liability May Be Predicated on Both Negligence and Unseaworthiness. The Trial Court Erred in Requiring Plaintiff to Elect Between Negligence and Unseaworthiness.

This is a seaman's action to recover damages for personal injuries asserting rights under the maritime law brought on the law side of the court with trial by jury. Plaintiff attempted to allege both negligence and unseaworthiness. By pretrial order the trial court ruled that the plaintiff could not join in one action a cause of action based upon unseaworthiness and one based upon negligence. The proof at the time of trial sustained both. The plaintiff was required to elect his remedy and elected to proceed upon the issues of negligence alone (R. 8). The court's ruling was erroneous and resulted in prejudicial error. The result of such a ruling can be best demonstrated by the opinion of the Supreme Court of the United States in the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099, which very clearly describes the absolute liability of a vessel owner in cases where unseaworthiness is established. The questions of reasonable care, notice and other related

questions do not occur where unseaworthiness is established. We quote briefly from that opinion.

> (U.S. p. 94) "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich v. Southern S.S. Co., supra; Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52; *Carlisle Packing Co. v. Sandanger, supra.* It is a form of absolute duty owing to all within the range of its humanitarian policy."

Plaintiff's claim derives from two sources, the Jones Act, 46 U.S.C.A., Sec. 688, which gives the right of action for negligence, and the general maritime law which gives a right of action for unseaworthiness. *Branick v. Wheeling Steel Corp.* (C.C.A. 3) 152 F.(2d) 887, 889-890. This case was, therefore, an action under the maritime law as modified or supplemented by the Jones Act.

While the question of election has been involved in a substantial number of cases, only two appellate courts have had this issue directly before them and have passed upon it. They are the United States Circuit Courts of Appeal for the Second Circuit and the Third Circuit. Both have decided that to compel an "election" between negligence under the Jones Act and unseaworthiness

under the general maritime law constituted prejudicial error. *German v. Carnegie-Illinois Steel Corp.* (CCA3) 156 F.(2d) 977; *McCarthy v. American Eastern Corporation* (CCA3) 175 F.(2d) 724, *cert. den.,* 338 U.S. 868; *Balado v. Lykes Bros. S.S. Co.* (CCA2) 179 F.(2d) 943. In all other appellate cases where the question has been touched upon it has been referred to only by way of dicta. The first appellate opinion was in the case of *German v. Carnegie-Illinois Steel Corp, supra,* decided on August 19, 1946. In that case a seaman was injured when he slipped while oiling up the engines. He charged negligence on the ground that another seaman had carelessly dropped oil on the foot box on which he was standing, and unseaworthiness on the ground that the vessel owner failed to provide a guard rail. Upon defendant's motion, the trial judge required him to "elect" between negligence and unseaworthiness. Plaintiff elected to proceed on the theory of negligence, and as in the case at bar, the trial resulted in a jury verdict for the defendant. On appeal, the Circuit Court of Appeals for the Third Circuit set the verdict aside and remanded the case for a new trial, holding that the required "election" constituted prejudicial error. The court's conclusion that the error was prejudicial was peculiarly prophetic, for the second trial of the case resulted in a verdict for the plaintiff. *German v. Carnegie-Illinois Steel Corp.,* 75 F. Supp. 361. We proceed to a historical analysis of the foundation for the *German* decision.

Under the general maritime law, prior to the passage of the Jones Act, a seaman who suffered personal injuries in the service of his ship could hold the ship and

her owners liable for (a) maintenance and cure; (b) wages to the end of his contract; and (c) indemnity by way of compensatory damages if his injuries resulted from the unseaworthiness of the vessel or her appliances. *The Osceola,* 189 U.S. 158, 47 L.Ed. 760. He could not on the other hand recover damages for injuries suffered through the negligence of a fellow servant, for under the general maritime law the fellow servant doctrine was available to the vessel and her owners as a complete bar to recovery. *The Osceola, supra; The Arizona v. Anelich,* 298 U.S. 110, 120, 80 L.Ed. 1075, 1079. Although the traditional methods of enforcing these rights was by libel in admiralty, either *in personam* or *in rem,* the right of a common law remedy was "saved" under the Judiciary Act of 1789, (1 Stat. at L. 76, 77, Chap. 20). *Panama Ry. Co. v. Vasquez,* 271 U.S. 557, 70 L.Ed. 1085; *The Moses Taylor,* 4 Wall. 411, 18 L.Ed. 397. However, the choice of forum does not affect substantive rights and consequently, although the seaman may elect to proceed at law to enforce a right sanctioned by the maritime law and cognizable in admiralty, his rights are governed by substantive admiralty principles: *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 87 L.Ed. 239; *Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372, 62 L.Ed. 1171; *Seas Shipping Co. v. Sieracki, supra,* 328 U.S. 85, 90 L.Ed. 1099. In brief, prior to the passage of the Jones Act, the seaman's right to recover indemnity by way of compensatory damages was limited to a showing of unseaworthiness and this right was enforceable both in admiralty as well as at law.

The Jones Act brought new and additional rules of

liability into the maritime law. It created a right of action for damages through the negligence of the master or crew. *The Arizona v. Anelich, supra; Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220; and accorded to seamen the right to prosecute the action in federal courts at law with trial by jury, irrespective of diversity of citizenship, *Van Camp Sea Food Co. v. Nordyke* (CCA 9) 140 F.(2d) 902; and at the same time conferring concurrent jurisdiction upon the courts of the several states, *Engel v. Davenport,* 271 U.S. 33, 70 L.Ed. 813; *Bainbridge v. Merchants and Miners Co.,* 287 U.S. 278, 77 L.Ed. 302.

The Jones Act, 46 U.S.C.A., Sec. 688, provides, in pertinent part, as follows, and brings us to the immediate question before this court:

> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * * " (Italics supplied)

The defendant has asserted and has been sustained by the trial court that the phrase "at his election" requires the seaman to elect between theories of liability, that is to say, that it requires the seaman to choose whether he will assert liability on the theory of unseaworthiness under the old rules, or on the theory of negligence under the new rules and that it forecloses the assertion of liability upon both grounds in the same

action. This proposition on its face appears to be so unreasonable as to make it improbable.

What, then, is the election contemplated by the Jones Act? One aspect has already been considered, namely, the seaman's freedom of choice to proceed in admiralty, in rem, if desired, rather than at law. But there is a second aspect to the problem. While the Jones Act created and incorporated into the maritime law new rules of liability for injuries resulting from negligence, it did not create a new *cause of action* with respect to such injuries. In other words, recovery of damages based upon negligence was not intended to be cumulative to recovery in damages based upon unseaworthiness. Congress was simply providing an additional basis of liability upon which a single recovery of damages could be predicated; the operative facts, whether constituting unseaworthiness or negligence, or both combined, being common to both and *constituting but a single legal wrong resulting in a single cause of action.* This, in plain terms, means that a seaman is foreclosed from prosecuting from judgment on the merits, two actions based upon the same legal wrong, one on the theory of negligence and the other on the theory of unseaworthiness. If the seaman chooses to proceed to judgment on any single theory of liability he may not thereafter proceed again on another theory since his single cause of action once litigated on whatever theory is extinguished at the moment of judgment. The foregoing is consonant with the established principles of res judicata. *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L.Ed. 1069. An examination of the *Phillips* case served to demonstrate that, precisely for this reason, a

seaman cannot adequately enforce his rights under the maritime law unless he proceeds as the plaintiff here attempted to proceed. That is to say, unless he asserts *in the same action* all of the grounds upon which he expects a judgment in his favor. In that case the seaman had prosecuted to judgment (the judgment being adverse to the seaman) a libel in admiralty against a vessel owner for damages resulting from personal injuries allegedly caused "by negligence in failing to provide a safe place to work and to use reasonable care to avoid striking respondent, and by unseaworthiness and insufficiency of gear and tackle employed on the vessel" (at U.S. p. 318). Thereafter he brought a second action to recover damages for the same injury, based upon the negligent operation of the same appliances by the ship's crew. The Supreme Court held that the judgment on the merits of the first case operated as an absolute bar between the same parties since the second suit was upon the same cause of action as the first one. The court stated as follows:

> (U.S. p. 319) "The affect of a judgment or decree as res adjudicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree on the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also *as to every ground of recovery which might have been presented* * * * ."
>
> (U.S. p. 320) *"He is not at liberty to split up his demand and prosecute it by piecemeal, or present*

> *only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible*)." (Italics supplied.)

The trial court in its memorandum decision (R. 14) has adopted the defendant's argument to the effect that the *Phillips* case does not deal with an election under the Jones Act, but is simply a typical case of res adjudicata where an action had been tried under a theory of negligence and lost, and a second action alleging additional grounds of negligence had been filed. Both the trial court and the defendant have overlooked the fact that the Supreme Court in the *Phillips* case passed directly on this point. The Supreme Court pointed out that the first *Phillips* case was tried under the rule of *The Osceola, supra,* that is, under the theory of unseaworthiness alone, and that the court and counsel had misinterpreted the effect of the Jones Act in that case. The *Phillips* case, therefore, is direct authority on the precise question before this court. We quote from the court's opinion as follows:

> (U.S. p. 324) "It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery *open to respondent in the second case, was equally open to him in the first*. But evidently in the first proceeding both court and counsel misinterpreted the effect of Sec. 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in the *Osceola,* 189 U.S. 158, 175:
>
> " 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any

> member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident,'
>
> was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would have been sought and allowed, pleading the ground of negligence afterwards set up in the second action. *Nevertheless, the cause of action was one and indivisible,* and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of res judicata. Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not." (Italics supplied.)

It follows, therefore, that the second phase of the election contemplated by the Jones Act simply means that if the seaman proceeds to recover damages under the old rules on the ground that his injuries were occasioned by unseaworthiness he may not thereafter recover damages under the new rules on the ground that his injuries were caused by negligence. This does not mean that he cannot proceed on both grounds in the same action, for no matter whether the injuries were occasioned by unseaworthiness or by negligence, or both combined, there is but a single legal wrong for which he will recover one indemnity by way of compensatory damages. The crux of the matter is that plaintiff's right to assert both grounds of liability at law does not stem exclusively from the Jones Act. It derives primarily from the principles reviewed in the *Phillips* case, *supra,* considered in conjunction with the rules that

liability for unseaworthiness may be asserted on the law side of the court without encroachment upon the admiralty jurisdiction. Had Congress intended to foreclose this procedure it would not have been difficult to find suitable language to express such intent. The addition of the following italicized phrase, or its equivalant, would have been all that was necessary, namely, that "in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, *and if such action be at law, the said statutes shall apply to the exclusion of all laws or rules of liability.*" But Congress obviously had no such purpose in mind. At the time of the passage of the Jones Act it was the established doctrine that liability for unseaworthiness was enforceable on the law side of the court. Consistent with the principles reviewed in the *Phillips* case, *supra,* Congress in creating the new rules of liability for the benefit of seamen simply supplemented the existing maritime law by providing that in such action all of the prescribed railway acts shall apply. By this provision, the new rules were incorporated into and became an integral part of the maritime law, and by it, the seaman was left free to avail himself of the old rules of liability as well as the new, *provided both are asserted in the same action.*

It is abundantly evident from the foregoing that *German v. Carnegie-Illinois Steel Corp.,* 156 F.(2d) 977, is the consistent and logical culmination of firmly rooted principles of the maritime law. The proper rule is succinctly summarized in the *German* case at page 979:

"Obviously, there are two distinct issues to be tried. German was entitled to have the jury pass on both in accordance with established principles of negligence and general maritime law. If his proof can sustain either or both, he may recover damages * * * but, of course, only one compensation for the injuries he suffered. This he was denied by the action of the learned court below.

"We are unable to dismiss the error as being unprejudicial. * * * ."

Exactly the same question came before the Circuit Court of Appeals for the Third Circuit again in the case of *McCarthy v. American Eastern Corporation, supra,* 175 F.(2d) 724, certiorari denied, 338 U.S. 868, rehearing denied 338 U.S. 939. That court had before it the validity of a verdict in favor of the plaintiff on a claim which had as its basis both the unseaworthiness of the vessel and the negligence of the crew. The basis of the appeal was the alleged error in submitting both of these issues to the jury. The Third Circuit referred to the fact that although this question had been decided adversely to the appellant on one of its prior decisions (*German v. Carnegie-Illinois Steel Corp., supra*), in view of the insistent argument that its prior decision ran counter to decisions of the Supreme Court of the United States, the court reviewed its prior case and amplified the reasons which led to its conclusion. After discussing the rationale of the *Phillips* case, *supra*, the court then discusses its decision in the light of the traditional attitude of the courts toward the rights of seamen at page 726 as follows:

"Moreover, it seems clear to us that the rationale of the decision in *Baltimore S.S. Co. v. Phillips*

necessarily excludes the interpretation of the phrase 'at his election' for which the defendant contends. For the doctrine of res judicata, which the court applied in that case, is bottomed upon the proposition that a party should not be afforded a second chance to litigate a question as to which he has already had the opportunity of a day in court. If a seaman in asserting a cause of action derived both from the old rules of the maritime law and the new rules of the Jones Act must confine himself to only one of these grounds for recovery and forever lose the benefit of the other by the application of the doctrine of res judicata, that doctrine applies in a very much harsher form to those who have always been regarded as wards of the admiralty in special need of protection than it does to all other litigants. For not only would an injured seaman have to decide at his peril, and in advance of judicial determination, which of two possible bases of his case was better grounded in law and fact, but he would also have to stake his whole possibility of recovery upon that choice, being barred from ever at any time asserting the other ground. He would thus be denied the right to any day in court upon what may turn out to have been his only valid ground for relief. And in some cases the choice might well be the nice one, often baffling to the most experienced lawyer, as to whether the injury was due to the failure of the owner to furnish suitable appliances or the negligence of the crew in their use. We cannot believe that Congress when it passed the Jones Act as a measure for the relief of injured seamen intended that it should put them at their peril to any such choice as this."

The court then concludes its decision with the state-

ment that the election referred to in the Jones Act was an election of remedies between a suit in admiralty and a civil action with a right of trial by jury.

The Circuit Court of Appeals for the Second Circuit originally in the cases of *Skolar v. Lehigh Valley R. Co.*, 60 F.(2d) 893, and *McGhee v. U. S.*, 165 F.(2d) 287, gave support to the proposition that an election between the two remedies would be required. These two cases are the basis of some decisions in inferior tribunals requiring an election. It was also on the basis of these two decisions that the District Court for the Western District of Washington, Northern Division, originally ruled that an election between negligence and unseaworthiness must be made (R. 15) and which ruling was thereafter perpetuated under a tenuous interpretation of the doctrine of *stare decisis* (R. 15). The District Court in its opinion on plaintiff's motion for a new trial makes this amply clear and stated as follows: "It would be inappropriate for the present judge to reexamine the question in the absence of exceptional circumstances and the third ground of plaintiff's motion ought to be denied on that basis alone." What has been overlooked is that the *Skolar* and *McGhee* cases, the basis of the original decision in the District, have been overruled by the Circuit Court of Appeals for the Second Circuit.

In the case of *Balado v. Lykes Bros. S.S. Co.*, 179 F.(2d) 943, the Circuit Court for the Second Circuit reversed its prior holdings in the *Skolar* and *McGhee* cases, *supra*. The *Balado* case was tried upon the theories of negligence and unseaworthiness. In the charge to the jury, however, the trial court removed the issue

of unseaworthiness from the jury. The question again before the Circuit Court was whether these two issues could be presented in the same proceeding. The court refers to its prior decisions and reverses its prior ruling. We quote from page 945 as follows:

> "The question whether the plaintiff must elect whether to claim damages under the Jones Act for negligence, or under maritime law for unseaworthiness before submitting his claims to a jury may perhaps be raised on a new trial because of certain dicta in our decisions in *Skolar v. Lehigh Valley R. Co.,* 60 F.(2d) 893, 894, and *McGhee v. United States,* 165 F.(2d) 287. On this matter of election of remedies we find the analysis by Judge Maris in the opinion of the Supreme Court in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, most persuasive. In accordance with the view there expressed we think there will be no necessity for such an election in the future. In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act. On the evidence before us we can discover no proof of negligence on the part of the defendant which caused any injury to the plaintiff. If the plaintiff can sustain any claim for damages it will be founded on proof that the ship was unseaworthy when she sailed, and not on negligence of the officers and crew."

Prior to the publication of the decision of the *Balado* case, *supra,* the District Court of California, Southern Division, in the case of *Reed v. The Arkansas,* 88 F.Supp. 993, held that an election would be required. After the decision of the *Balado* case it was recognized

that no direct authority remained in support of the *Reed* decision, *supra.* By the case of *Thomsen v. Dorene B.*, 91 F.Supp. 549, a case emanating from the same district as the *Reed* case and decided several months after the *Reed* case, this is clearly demonstrated. We quote from the opinion of the *Thomsen* case at page 550:

> "Respondents rely upon *Reed v. Arkansas* (S.D., Cal., 1950) 88 F.Supp. 993, and the cases cited therein, including *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 49 S.Ct. 75, 73 L.Ed. 220. Also cited therein is *Skolar v. Lehigh Valley R. Co.,* 2 Cir., 1932, 60 F.(2d) 893, and *McGhee v. United States,* 2 Cir., 1947, 165 F.(2d) 287.
>
> "We hold these cases not controlling.
>
> "In the *Pacific S.S. Co.* case (*supra*), the matter of election between a suit under the Jones Act and an action for unseaworthiness was not properly in issue before the court, and the language in that decision is dictum.
>
> "In addition, *German v. Carnegie-Illinois Steel Co.,* 3 Cir., 1946, 156 F.(2d) 977, and *McCarthy v. American Eastern Corp.,* 3 Cir., 1949, 175 F.(2d) 724, cert. den. 1949, 338 U.S. 868, 70 S.Ct. 144, 94 L.Ed. 532, are cases directly in point upon the question as to the election and hold that one is not required.
>
> "*Balado v. Lykes Bros.,* 2 Cir., 1950, 179 F.(2d) 943, was a case in which the decision on election was not necessary, but in that case the second circuit referring to its decisions in the *Skolar* and *McGhee* cases (*supra*) terms its language therein on the subject of election as dicta and indicates its dissatisfaction with its own language, and reaches a contrary conclusion."

The courts almost uniformly now hold that a seaman may include charges of unseaworthiness and negligence in one cause of action. One of the most recent cases to review the authorities on this question is the case of *Hill, Jr. v. Atlantic Navigation Co.* (D.C. Va.) 1954 A.M.C. 2150, 2151, as follows:

> "In their brief, the respondents question the libellant's procedure of pleading a cause of action premised on a general admiralty doctrine, such as unseaworthiness, along with a claim under the Jones Act, 46 U.S. Code, sec. 688. Election to seek relief under the Act, they argue, precludes assertion of liability on any other ground; they cite *Pacific S.S. Co. v. Peterson* (1928), 278 U.S. 130, 1928 A.M.C. 1932. If this was ever the law, surely it is no longer. *The Fletero v. Arias* (1953), (4 Cir.), 1953 A.M.C. 1390, 206 F(2d) 267; *Balado v. Lykes Bros. S.S. Co.* (1950), (2 Cir.), 1950 A.M.C. 609, 179 F.(2d) 943; *McCarthy v. American Eastern Corp.* (1949), (3 Cir.), 1953 A.M.C. 1865, 175 F.(2d) 724."

Departments of the Superior Court of the State of Washington until recently were divided on the question of "election." *Spangler v. Matson Navigation Co.*, 1950 A.M.C. 409; *Lewis v. Orion Shipping & Trading Co.*, 1953 A.M.C. 546. With the decision of the Supreme Court of the State of Washington in the case of *Delbert L. Williams v. Steamship Mutual Underwriters Assn., Ltd.*, 145 Wash. Dec. 191, 198, 1954 A.M.C. 2006, all doubt has now been removed and seamen are no longer required to elect a remedy. In the *Williams* case, *supra*, the problem before the court was the applicability of the three year statute of limitations under the Jones Act. In determining that the action was not barred by

the statute of limitations on the ground that a recovery under the pleadings could be based either under the Jones Act, or under the general maritime law, the court stated as follows at page 198:

> "Whether appellant's injury was due to the unseaworthiness of the vessel as defined by the long-established rules of maritime law, or to the negligence of officers or members of the crew under the new rules made available by the Jones Act, or both, there was but a single wrongful invasion of a single primary right and there are not two separate claims or causes of action. *Baltimore S.S. Co. v. Phillips,* 274, U.S. 316, 71 L.Ed. 1079, 47 S.Ct. 600 (1927); *Pate v. Standard Dredging Corp.,* 193 F.(2d) 498 (1952).
>
> "When a seaman has alleged an injury in consequence of a maritime tort in an action on either the admiralty or the law side of a United States district court or in a state court, the issue of unseaworthiness may be raised notwithstanding allegations of negligence and notwithstanding failure to allege unseaworthiness. *Sandanger v. Carlisle Packing Co.,* 112 Wash. 480, 192 Pac. 1005 (1920), affirmed, *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255, 66 L.Ed. 927, 42 S.Ct. 475 (1922); *Plamals v. S.S. 'Pinar del Rio,'* 277 U.S. 151, 72 L.Ed. 827, 48 S.Ct. 457 (1928)."

It must be noted that in the *Williams* case, *supra,* the Supreme Court of the State of Washington arrived at the same result, that an election is not required, without reference to the *German, McCarthy* and *Balado* cases, *supra.*

Under the foregoing it is evident that where the operative facts constituting the seaman's cause of action

for damages tend to establish both negligence and unseaworthiness, the seaman is not merely privileged but bound by both bases of liability unless he wishes to run the risk of being deprived of relief altogether. It is seldom possible to predict in advance whether the proofs adduced at trial will sustain one or other basis of liability, and it is never possible to foretell which the jury will adopt and which it might reject. To impose upon the seaman the type of "election" contended for by the defendant, and ordered by the trial court, would be to force upon the seaman a rule which is supported neither in logic, in reason, or in policy, and which would seriously hamper the enforcement of a seaman's rights. The entire basis of the trial court's decision on this point is the elective provision in the Jones Act, but the election contemplated in the Jones Act has no relation to the type of election ordered by the trial court in the instant case. To read the Act in the manner contended for by the defendant would be not merely to construe narrowly a species of legislation remedial in character, intended for the benefit and protection of seamen who are peculiarly the wards of admiralty, but to do violence to legislation whose provisions are calculated to enlarge and not to narrow the rights afforded to seamen. Such remedial legislation is always to be liberally construed. *The Arizona v. Anelich, supra,* 298 U.S. 110 at 123; *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424 at 431; *Chelentis v. Luckenbach S.S. Co., supra,* 247 U.S. 372, 380, 381; *Thurston v. U.S.* (CCA9) 179 F.(2d) 514, 517.

We respectfully submit that the trial court erred in requiring the plaintiff to elect between unseaworthiness and negligence.

II. In a Seaman's Case Where the Negligence of the Defendant Has Been Established, a Verdict by the Jury for the Defendant Cannot Stand Under the Rule of Comparative Negligence, Notwithstanding the Seaman's Contributory Negligence. Plaintiff Is Entitled to a New Trial As a Matter of Law.

The evidence at the time of trial not only preponderated to the effect that the place at which the plaintiff fell was covered with oil, but the only evidence in the case is that the plaintiff slipped on an oily spot on the deck. Not only is this fact shown by plaintiff's own testimony and the testimony of Thomas Smith (R. 50) and Robert Hamilton (R. 177), but the accident report prepared by the defendant and admitted into the evidence as plaintiff's exhibit No. 1 (R. 44) states as follows:

> "Question 11—Describe fully how injury occurred: Slipped when carrying slop hose along oily deck. Fell flat, forehead hitting the deck, hose hitting back of head, hose on right shoulder." (R. 44 and plaintiff's exhibit No. 1)

The accident report was prepared on board the vessel by Second Officer De Jong after he had talked to the plaintiff and all of the other witnesses to the accident (R. 265). The report was signed by Chief Officer Regan (R. 249, 269). It must be assumed that Chief Officer Regan also first determined the facts recited in the report before signing the same. Chief Officer Regan did not testify at the time of trial, nor was his deposition taken by the defendant (R. 227). The only two witnesses called by the defendant on the facts of the case were Captain Robert W. Daly, who testified that he had made no inspection whatsoever of the deck prior to the

accident (R. 227), and Second Officer De Jong, who made a round of the deck some time previous to the accident (R. 269) but made no inspection immediately following the accident (R. 266).

The evidence is conclusive, therefore, that there was oil on the deck. The evidence is also conclusive that the presence of oil on the deck would be the violation of a standing order on board the vessel and could only result from negligence of crew members (R. 235, 236, 246, 269). The evidence also conclusively shows that the plaintiff, Vance W. Williams, had performed no work in the area where the accident had occurred during the tank-cleaning operations (R. 75). The record then is undisputed that the deck was oily and that said oily condition was the result of negligence of employees other than the plaintiff.

The trial court properly instructed the jury that the law of comparative negligence applied and that contributory negligence could not entirely defeat plaintiff's claim if the defendant was in any degree negligent, and that in such an event, plaintiff's own negligence would only diminish the award (R. 298). In view of the conclusive evidence of defendant's negligence, the failure of the jury to return any verdict for the plaintiff can only mean that the jury did not properly weigh the evidence and did not follow the instructions of the court, and that plaintiff's motion for a new trial should have been granted as a matter of law.

In the case of *Becker v. Waterman S.S. Co.* (CCA2) 179 F.(2d) 713, a mate employed upon a steamship brought an action as a result of slipping on some oil

near the deep tanks of the vessel. Defendant contended there could be no recovery because of plaintiff's duty to correct the dangerous condition of which he had knowledge. The court in disposing of this defense discussed the application of the rule of negligence and permitted recovery for plaintiff notwithstanding his own contributory negligence. The court stated at page 715:

> "In the case at bar the jury was entitled to find, as it apparently did, that a contributing cause of the accident was the negligence of the assistant engineer in failing to pump the oil out of the rose boxes as he had said he would do. If the plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action. *Socony-Vacuum Oil Co. v. Smith, supra,* 45 U.S. Code, sec. 53. Hence the court was right in denying the defendant's motions to dismiss and to direct a verdict."

In the case of *Thurston v. U.S.* (CCA9) 179 F.(2d) 514, this court applies the rule which is determinative of this question. In that case a decision of the United States District Court of Oregon was reversed where recovery was denied to a third assistant engineer for injury sustained as a result of falling into an open hatch in the engine room. The trial court held that although the evidence showed that the hatch had been negligently left open by someone other than the appellant, that the appellant was negligent in the performance of his duties in failing to inspect and discover the open hatch, and further held that appellant's own negligence was the sole and proximate cause of the injury and denied a recovery of divided damages. The action of the trial

court in the *Thurston* case, *supra,* is exactly the same as the action taken by the jury in the instant case and is error as a matter of law. We quote to that effect from the opinion of the *Thurston* case at page 516:

"Appellant was injured by falling into an open hatch in the engine room floor. The evidence is uncontradicted that some other member of the crew had negligently removed the hatch cover, leaving the hatch open. Appellant negligently failed in the performance of his duty to inspect the engine room, whereby he failed to discover the open hatch into which he fell. Although the negligence of someone else making the engine room floor unseaworthy continued until combined with negligent failure to inspect the floor, the district court held that appellant's negligence was the sole proximate cause of the injury and denied a recovery of divided damages.

"We do not agree. The Supreme Court in *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265, decided to the contrary that in such cases of negligent failure to perform a duty owed the ship, the doctrine of comparative negligence applies. There the negligent performance of an oiler's duty by using a defective step, of which he knew the defect, combined with the negligent failure of the ship to repair the step, with knowedge of the defect, caused the oiler's fall and injury. It was contended that the doctrine of assumption of risk applied to such negligent performance of the oiler's duty and not the admiralty rule of comparative negligence. As the court stated, 305 U.S. pp. 424, 426, 425, 59 S.Ct. at page 263:

" 'The question is whether assumption of risk is a defense in a suit brought by a seaman under the

Jones Act to recover for injuries resulting from his use, *while on duty,* of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.'

" 'Respondent was employed, as an oiler in petitioner's engine room. It was his *duty* while the vessel was under way to touch with his finger, at intervals of twenty minutes, a bearing of the propeller shaft, in order to ascertain whether it was overheating and in need of additional lubrication. Directly in front of the bearing, as he approached it, was an iron step, located about one foot above the engine room floor and bolted to the bedplate which supported the bearing * * *'

" ' * * * The fall was caused by a defective step on which respondent stood while on duty, when seeking to learn, by touching with his finger, whether an engine bearing was overheated.

" 'In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence, instructing the jury that negligence of respondent contributing to the accident was not a bar to recovery but was to be considered in mitigation of damages. The court refused petitioner's request for an instruction that if respondent *could have performed his duty* without use of the defective step, he assumed the risk of injury from it. Instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance.' (Emphasis supplied)

"We are unable to see any difference between the oiler's negligence in failing in his duty to use the safe method of inspecting the shaft bearing's temperature and the failure of the appellant in his duty

> to inspect the engine room. In both cases prior negligence to supply a safe place to work due to the negligence of someone other than the injured seaman continued until the injury which was caused by the combined negligence. Were the identity of the two cases not the same we would reach the same conclusion by applying the doctrine of liberal construction applicable to seamen's cases and stated in the *Socony-Vacuum* case, *supra,* 305 U.S. p. 431, 59 S.Ct. 262, 83 L.Ed. 265.
>
> "With regard to appellant's contention that the award for maintenance and cure is insufficient, we think the award is sustained by the evidence.
>
> "The decree is reversed and the cause remanded to the district court for a retrial of the issue of appellant's injuries pursuant to the principle above recognized."

We respectfully submit that plaintiff was entitled to some verdict as a matter of law under the evidence of the case and that the judgment should be reversed and that plaintiff should be granted a new trial on this ground alone.

III. Where the Presence of Oil on the Deck Could Only Result from Negligence As the Violation of a Standing Order, the Court's Instruction that the Plaintiff Must Also Prove that the Defendant Had Notice with an Opportunity to Correct the Oily Condition Was Prejudicial Error.

In actions under the Jones Act, the employer is liable for the acts of negligence of fellow servants. *International Stevedoring Co. v. Haverty,* 272 U.S. 50, 71 L.Ed. 157. It is sufficient to prove that an unsafe condition was the result of a negligent act of a fellow crewman

in order for the plaintiff to recover. Liability in cases where negligence of a fellow servant exists as a cause of the unsafe condition does not depend upon notice of the condition being brought to the attention of the employer. The evidence at the time of trial, both from plaintiff's witnesses and defendant's witnesses, was to the effect that the existence of any oil on the deck could only be the result of the negligence of the crew member who failed to remove the oil spell immediately after it occurred (R. 236).

The MV "TIDEWATER" was an oil tanker, and because of the nature of the cargo carried on board, oil spills were not uncommon. If oil spills were permitted to remain on deck they would constitute a constant hazard to the ship's crew (R. 237). Because of this danger, a standing order was always in effect that any oil on deck was required to be cleaned up immediately. The failure, therefore, of a crew member to observe a spill at the time it occurred and his failure to clean it up immediately constitutes negligence sufficient in and of itself upon which to base a recovery. Captain Robert W. Daly testified as follows in that regard (R. 235):

> "Q. All right. Now suppose in the process of disconnecting the slop hose or in taking his own hose out of the tank some oil or some spillage occurs on the deck, what is he supposed to do?
>
> A. Wipe it up.
>
> Q. Is he supposed to do it before he puts his stuff away or as part of the same process?
>
> A. Yes. (253)
>
> Q. On other words, his job as soon as it appears is to immediately take some steps to either neutral-

ize it by putting sand on it or wiping it up, that is true, isn't it?

A. Yes, sir.

Q. And if a man doesn't do that he is not doing his job?

A. No.

Q. That is correct, isn't it?

A. Yes.

Q. And whoever cleans it out has got to do that immediately and everybody expects him to do that?

A. Yes.

Q. The master expects him to do that, the officers and the other members of the crew who may be working somewhere else?

A. Yes.

Q. So there can be no question about it, it must be done immediately and he doesn't have to wait for an order from an officer to do it, does he?

A. No.

Q. As a matter of fact, if an officer would come by and see an oil spill someone would probably get the devil for not having wiped it up, wouldn't they?

A. They should, yes.

Q. In other words, the existence of an oil spill itself (254) on that ship shows somebody didn't wipe it, isn't that correct?

A. Yes."

Notwithstanding the foregoing, the court instructed the jury as follows (R. 296):

"If you should find: that the plaintiff was caused to fall by reason of an oil condition on the foredeck

of the TIDEWATER, that fact would not of itself warrant you finding that the defendant was negligent. To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not only that there was this oil condition which caused the plaintiff to fall, but also that the defendant or its employees knew or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it because the defendant is not liable for a transitory danger of such character in the absence of actual or constructive knowledge of the existence of the condition."

By the foregoing instruction the court, contrary to the evidence, stated that the presence of oil on the deck in and of itself was not negligence and injected into the issues the question of notice to the defendant of an oily condition and indicated to the jury the oily condition of the deck may be of a transitory nature, the knowledge of which must be brought home to the defendant before liability would attach. This is contrary to the law under the evidence and constituted prejudicial error.

In the case of *Adams v. American President Lines, Ltd.*, decided by the Supreme Court of California, en banc, on February 10, 1944, 1944 A.M.C. 550, a case involving similar facts, was tried before a jury in San Francisco, California. In that case the jury returned a verdict in favor of the plaintiff after which the trial court granted defendant's motion for a new trial. The Supreme Court of the State of California reversed the lower court.

In that case the plaintiff, a seaman on the SS "PRESIDENT PIERCE," slipped on an orange peel on a stairway

sustaining a severe hand injury. There was no evidence as to how long the orange peel had been on the stairway and the only evidence was that in all probability it was dropped by a member of the crew in the area after meal-time. The appellate court handled the question of liability very clearly as follows:

> "The plaintiff met the requirements of proof on his part when he introduced evidence from which the jury properly could infer that the presence of the orange peel was due to an act of negligence within the scope of employment. He was not required to negative any defense by which the defendant might successfully rebut his *prima facie* case. Rather it was for the defendant to go forward with evidence tending to prove that the presence of the orange peel was due to the perpetration of some act of malicious mischief, or good-natured scuffling which would take the act outside the scope of the employment. (*Runkle v. Southern Pacific Milling Co.,* 184 Cal. 714, 721, 195 P. 398, 16 A.L.R. 275; *Kruse v. White Brothers,* 81 Cal. App. 86, 253 P. 178.) No such evidence was introduced, and in the absence thereof, the evidence may not be said to support a reasonable inference that the act was without the scope of the employment."

In the case of *Becker v. Waterman Steamship Corporation* (CCA2) 179 F.(2d) 713, *supra,* the plaintiff, a deck maintenance seaman, slipped and fell on a blob of oil, which he had not seen, in a deep tank of the vessel. There was no evidence as to how long the oil had been at the particular place where plaintiff fell. There was evidence that an assistant engineer, prior to the accident, had been instructed to clean some spilled oil out of the rose box in the same deep tank and that he had

failed to do so. Liability in that case was predicated upon the failure of the assistant engineer to do his job and the question of the transitory nature of the condition and of notice to the defendant of that particular oily spot was not considered by the court as a defense.

In the case of *Bachman v. U.S.A.,* 72 F.Supp. 298, the libelant slipped on some oily deck plates in the engine room of the vessel. The negligence consisted of the failure to keep the area mopped up. The court found for the libelant entirely upon the negligent failure to clean up the oil spill. We quote from the opinion of the court at page 300:

> "The only evidence in the case touching the matter of whether the ship was negligent or was unseaworthy seems to me to come from the libellant himself; at least, that is the only evidence of a convincing nature. The witness Ames spoke of the usual situation respecting due care and seaworthy condition at the place of the accident, rather than as to a personal knowledge of the exact condition of the place at the time of the alleged occurrence of the accident.
>
> "So that the court finds, from a preponderance of the evidence, that the iron plates at the time and place of the accident were in an unseaworthy and negligent condition by reason of the failure of the ship and shipowner to keep the oil slick wiped up with a proper and suitable instrument such as a dry mop, and that as a result of such unseaworthy and negligent condition, the libellant sustained the injuries and damages for which he seeks compensation in this action."

The instruction of the court was obviously prejudi-

cial error. We respectfully submit that the judgment on the verdict should be reversed on the basis of this instruction alone.

CONCLUSION

It is respectfully submitted that the trial court erred in requiring the plaintiff to elect his remedy between negligence under the Jones Act and unseaworthiness under the general maritime law, and that the ruling of the court prevented the plaintiff from having a fair trial; that prejudicial error also occurred as a matter of law under the facts of the case where the jury failed to return any verdict for the plaintiff; that the court's charge that the plaintiff must prove that the defendant had notice of the oily condition with the opportunity to correct the same was prejudicial error under the evidence of the case. The foregoing errors are of an extremely prejudicial nature and the judgment on the verdict should not stand. We submit that the judgment should be reversed and the cause returned to the district court for a new trial.

Respectfully submitted.

Sam L. Levinson
Edwin J. Friedman
Levinson & Friedman
Attorneys for Appellant

No. 14677

United States Court of Appeals
For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDEWATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Attorneys for Appellee.

603 Central Building,
Seattle 4, Washington.

FILED
MAY 23 1955
PAUL P. O'BRIEN, CLERK

THE ARGUS PRESS, SEATTLE

No. 14677

United States Court of Appeals
For the Ninth Circuit

Vance W. Williams, *Appellant,*

vs.

Tidewater Associated Oil Company, *Appellee.*

Appeal from the United States District Court,
Western District of Washington
Northern Division

BRIEF OF APPELLEE

Bogle, Bogle & Gates,
Edw. S. Franklin,
Attorneys for Appellee.

603 Central Building,
Seattle 4, Washington.

The Argus Press, Seattle

INDEX

Page

Preliminary Statement of the Case 1
Counter-Statement of the Case 2
Argument 5
  Appellant's First Assignment of Error 5
    Election Is Statutory Requisite Under Jones Act Where Seaman's Complaint Commingles Causes of Action for Negligence and Unseaworthiness 5
    Jones Act Creates New Cause of Action 7
    Supreme Court Definition of Statutory Election Adhered to by Lower Courts 12
    Development of Minority Doctrine that Election Refers to Choice of Remedies Between a Civil Action and a Suit in Admiralty 14
    Requiring Election Was Harmless Error 21
  Answer to Second Assignment of Error 25
  Answer to Third Assignment of Error 27
Conclusion 29

TABLE OF CASES

Adams v. President Lines, 23 Cal.(2d) 681, 146 P. (2d) 1 28
Balado v. Lykes Bros. Steamship Company (2 C.C.A.) 179 F.(2d) 943 ..... 16, 19
Blodow v. Pan Pacific Fisheries Company, 275 P. (2d) 795 ..... 26, 28
Branic v. Wheeling Steel Corporation (3 C.C.A.) 152 F.(2d) 887 14
Burkholder v. United States (E.D. Pa.) 60 F.Supp. 700 19
Cookingham v. United States (3 C.C.A.) 184 F. (2d) 213, cert. den. 340 U.S. 935, 95 L.ed. 675 21-22
Daniels v. Pacific-Atlantic Steamship Company (E.D. N.Y.) 120 F.Supp. 96 ..... 23, 26
Engel v. Davenport, 271 U.S. 33, 70 L.ed. 813 7
Freitas v. Pacific-Atlantic Steamship Company, 218 F.(2d) 649 29

Page

German v. Carnegie-Illinois Steel Company (C.C.A. 2) 156 F.(2d) 977 .... 14, 15, 19

Gladstone v. Matson Navigation Company, 269 P. (2d) 37 27

Hammond Lumber Company v. Sandin, 17 F.(2d) 760 12

Lindgren v. United States, 281 U.S. 38, 74 L.ed. 686 .... 9, 10, 20

Manhat v. United States (2 C.C.A.) 220 F.(2d) 143.. 29

McCarthy v. American Eastern Corporation, 175 F. (2d) 724 .... 15, 16, 19

McGhee v. United States of America (2 C.C.A.) 165 F.(2d) 287 12-13

Osceola, The, 189 U.S. 158, 17 L.ed. 760 6

Pacific Steamship Company v. Peterson, 278 U.S. 130, 73 L.ed. 220 .... 9, 11, 20

Panama Railroad v. Johnson, 264 U.S. 375, 68 L.ed. 748 .... 7, 20

Phillips v. Baltimore Steamship Company, 295 Fed. 323, 9 F.(2d) 902, 274 U.S. 316, 71 L.ed. 1069 14, 16, 17, 18, 19, 20

Phillips v. United States, 286 Fed. 631 16

Pietryzk v. Dollar Steamship Lines, 31 Cal. App. (2d) 584, 88 P.(2d) 783 27

Plamals v. The Pinar Del Rio, 277 U.S. 150, 72 L.ed. 827 .... 8, 20

Reed v. The Arkansas (D.C. S.D. Cal.) 150 A.M.C. 1410 19

Shannon v. Union Barge Line Corporation (3 C.C.A.) 194 F.(2d) 584, cert. den. 344 U.S. 846, 97 L.ed. 658 22

Sieracki v. Seas Shipping Company (3 C.C.A.) 149 F.(2d) 98 15

Skolar v. Lehigh Valley R.R. (2 C.C.A.) 60 F.(2d) 893 12

Smith v. Lykes Brothers-Ripley S.S. Co. (5 C.C.A.) 105 F.(2d) 604 13

TEXTBOOKS

Page

2 Sunderland, Statutory Construction (1943 ed.) 3309, §4705 20

STATUTES

1 Stat. at L. 76, 77, Chap. 20 (Judiciary Act of 1789) 6

46 U.S.C.A. §688 (Jones Act) 1, 5, 7, 9, 10, 12, 25, 28

United States Court of Appeals
For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,* vs. TIDEWATER ASSOCIATED OIL COMPANY, *Appellee.*	No. 14677

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLEE

PRELIMINARY STATEMENT OF CASE

This personal injury action, brought by a seaman against his employer under the Jones Act (46 U.S.C.A. §688) for alleged acts of negligence resulted in a jury verdict in favor of appellee employer.

The negligence alleged as disclosed by the pretrial order was as follows:

1. That on or about the 12th day of January, 1953, at about the hour of 1:00 o'clock p.m., while the Tanker "Tidewater" was alongside of a dock at Portland, Oregon, the plaintiff was in the course of his employment assisting in carrying a heavy hose from the port side of said vessel to its starboard side.

2. That at said time and place the defendant carelessly and negligently failed to provide to the plaintiff a safe place to work in that the deck area which plaintiff was required to cross was covered

with oil leaving the same in a dangerous and slippery condition, and that said deck of the vessel was covered with an improper type of paint and that the paint was improperly applied in that no abrasive material was added for safe footing rendering the deck generally unnecessarily slippery and hazardous.

3. That as a direct and proximate result of the defendant's negligence the plaintiff slipped and fell with great force and violence. (R. 4)

COUNTER-STATEMENT OF THE CASE

Appellant's injuries occurred in the afternoon of January 12, 1953, at Portland, Oregon, while serving as maintenance man as a member of the crew of the tanker "TIDEWATER." The vessel was lying alongside her dock. Appellant and another seaman were engaged in carrying a hose from the port side of the foredeck to the starboard side, when he slipped (R. 98). There was some confusion among the men as to the route to pursue (R. 98). The men stopped for a discussion and then proceeded across the deck. As they did so, appellant's feet "gradually slid out from under me" and he fell to the deck (R. 98). The deck was slippery and wet from rain and mist (R. 154).

Appellant did not observe the condition of the deck he was traversing at the time of his accident (R. 99). He was the last of the three or four men carrying the hose (R. 97). Appellant did not see any oil on the deck where he slipped nor did he notice any oil on the deck at any time that he was carrying the hose (R. 154, 150). He was not warned by any of the men ahead of him

carrying the hose that there was any oil on the deck (R. 154).

Appellant first visited the foredeck of the tanker shortly before his accident which occurred around 2:00 P.M. In the morning he had worked on the after deck (R. 75). When he went forward in the afternoon the hose had been uncoupled and was lying on the deck (R. 82). As he proceeded along the foredeck in the direction of the hose, he did not notice any grease or oil on the port deck (R. 137). Prior to handling the hose he carried a reducer from the forward end of the port deck to the midship house, and while in the vicinity of tank No. 3 he slipped in what he surmised was a combination of oil and rain (R. 137). Appellant testified it was routine practice on tankers to clean up any oil spill as soon as discovered so he got a bucket of sand and sprinkled it in the area (R. 139). He did not know where the oil had come from in which he slipped (R. 138). After sanding this area appellant examined the foredeck for other oil spills requiring sanding but saw none (R. 142). He then proceeded forward to where the hose he was to carry was lying on the deck. He saw no grease or oil in the vicinity of the hose (R. 146) although the foredeck was "thoroughly wet."

Thomas Smith and Robert Hamilton, who assisted appellant in carrying the hose, testified in his behalf. Smith testified that Williams slipped between No. 2 and No. 3 tanks in an oil spill (R. 50), which was immediately sanded. Smith claimed the area of the oil spill was 50 feet long and 10 feet wide (R. 57). Smith's version of the alleged "oil spill" was impeached by appellee's introduction of Smith's signed statement (Ex-

hibit A-1) stating "there was no oil spilled at the spot where Williams fell" (R. 78, 79). Smith sought to explain the discrepancy between his oral testimony and written statement by alleging he was drunk the night before he signed the impeaching statement (R. 64).

Hamilton testified that he had not noticed any oil on the deck of the "TIDEWATER" any time before the accident (R. 193). He testified after Williams fell he went to his assistance and observed a three or four-foot area in which appellant slipped which "appeared" to be a combination of oil and water (R. 177), and which he had not noticed before. Hamilton was in front of Williams who was the last man on the hose. Like Smith, Hamilton's testimony was impeached by a written statement (Defendant's exhibit A-4) (R. 199, 200) wherein Hamilton had stated "so far as I know there was no oil or sand or abrasive material around the riser at the time when Williams fell. I don't remember if there was any oil on the deck at the exact spot where Williams fell."

Second Mate De Jong, the watch officer on the "TIDEWATER" during the time appellant and the other crew members were handling the hose testified that he made routine inspections of the foredeck, both before and after Williams' accident, but saw no oil on the deck (R. 259).

Appellant's allegation that improper deck paint was used on the deck of the "TIDEWATER" at the time of appellant's accident was a sharply disputed factual question. Appellant's witnesses testified that the deck paint

was not sanded. This was denied by Chief Mate Daly (R. 200, 221, 239) and Second Mate DeJong (R. 262).

Appellant introduced in evidence the accident report of the M/V "TIDEWATER" pertaining to plaintiff's injury (plaintiff's Exhibit 1). In answer to a query as to "how injury occurred," the accident report answer was "slipped when carrying a slop hose on oily deck."

This was explained by Second Mate DeJong as having been placed in the accident report by him based upon the statement of the appellant as to the cause of his accident some time after its occurrence (R. 261).

The jury returned a verdict in favor of appellee finding Williams' accident was not due to negligence on its part (R. 9).

ARGUMENT

Appellant's First Assignment of Error

Election Is Statutory Requisite Under Jones Act Where Seaman's Complaint Commingles Causes of Action for Negligence and Unseaworthiness

The Jones Act (46 U.S.C.A. §688) was enacted in 1920 and reads as follows:

> "§688. Recovery for injury to or death of seaman.
>
> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal represen-

> tative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007." (Italics ours)

Prior to its passage, seamen who suffered personal injuries in the service of the ship had only a cause of action against the shipowner or vessel for indemnity because of the unseaworthiness of the vessel or her appliances. There was no death action in admiralty. General maritime law precluded a recovery to seamen for injuries caused by the negligence of the Master or any crew member of the vessel. *The Osceola,* 189 U.S. 158, 47 L.ed. 760.

Seamen enforced this right of indemnity for unseaworthiness, in admiralty, either *in personam* or *in rem,* in addition to his admiralty remedies for unseaworthiness, the seaman could enforce this claim at common law by virtue of the "saving to suitors" clause of the Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20) "saving to suitors a common law remedy where the common law was competent to give it." Thus the common law courts of the state, and the law side of the Federal Court, in diversity cases, where available forum to seamen to litigate their claim for indemnity in addition to admiralty forum.

Jones Act Creates New Cause of Action

The Jones Act created a *new* and *substantive* and alternative cause of action in favor of the seamen based upon negligence to be enforced "at his election." This election has been continuously defined by the United States Supreme Court since 1924 in a series of decisions as an election between the choice of an action for an indemnity for unseaworthiness under the general maritime law or a cause of action arising out of negligence based upon the new statute.

In the case of *Panama Railroad v. Johnson* (1924) 264 U.S. 375, 68 L.ed. 748, the elements of the statutory election under the Jones Act were first delineated. The court was considering the constitutionality of the Jones Act which was attacked as violative of the uniformity demanded of the maritime law.

In discussing the essentials of the election prescribed by the Jones Act, the court said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. *The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."* (Italics ours)

In *Engel v. Davenport* (1926) 271 U.S. 33, 70 L.ed. 813, the court again redefined the elements of the statutory election required by the Jones Act as follows:

> " * * * Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence * * * in which he not only assumes the burden of proving negligence, but also, under Sec. 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. * * * "

In *Plamals v. The Pinar Del Rio* (1928) 277 U.S. 150, 72 L.ed. 827, the court was faced with the question as to whether or not the Jones Act carried with it the traditional admiralty lien. Again, redefining the elements of the statutory election under the Jones Act the court said:

> "In the system from which these new rules come no lien exists to secure claims arising under them, and of course, no right to proceed *in rem*. We cannot conclude that the mere incorporation into the maritime law of the rights which they create to pursue the employer was enough to give rise to a lien against the vessel upon which the injury occurred. The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. *Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both.*" (Italics ours)

The elements of the statutory election required under

the Jones Act were next reiterated by the Supreme Court in the case of *Pacific Steamship Company v. Peterson* (1928) 278 U.S. 130, 73 L.ed. 220. This case directly involved the judicial consideration of the phrase that "at his election" of the Jones Act since it was alleged that the seaman, by accepting wages, maintenance and cure had made his election under the Jones Act and could not sue for negligence. The court said:

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. * * * "

The court further stated at page 224:

> " * * * And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; * * * "

Any question as to the rule that the election prescribed under the Jones Act was a choice between the rights given under the general maritime law for indemnity and the alternative statutory right for negligence under the Jones Act was set at rest in the case of *Lindgren v. United States* (1930) 281 U.S. 38, 74 L.ed. 686. In this case Judge Sanford characterized the Jones Act as giving "new and substantive rights."

In the *Lindgren* case, *supra,* the administrator of a deceased seaman leaving no designated beneficiaries under the Jones Act was denied a recovery under the Virginia State death statute for negligence. The court held that Congress had preempted the field in seamen injury cases by the enactment of the Jones Act. The court pointed out that prior to the enactment of the Jones Act the general maritime law gave no death action for negligence. The court further noted that a statutory election was not required in death actions under the Jones Act as in the case of personal injury to seamen since no choice of remedies was involved between a right of indemnity for seaworthiness and a right of action for negligence under the Jones Act in death actions.

The court said:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola,* 189 U.S. 175, 47 L.ed. 764, 23 Sup.Ct. Rep. 483, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. *Apparently for this reason the words 'at*

*his election' * * * which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in Pacific S.S. Co. v. Peterson,* 278 U.S. 139, 73 L.ed. 224, 49 Sup. Ct. Rep. 75, *gave him, as alternative measures of relief, 'an election * * * (between) the right under the new rule to recover compesatory damages for injuries caused by negligence, and (48) the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness' * * * were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the state in which the injury was received."* (Italics ours)

In reaching its conclusion from an analysis of the entire context of the Jones Act, that the election required of a seaman suing for personal injuries was between unseaworthiness and negligence the court relied and cited the case of *Pacific Steamship Company v. Peterson, supra.*

Supreme Court Definition of Statutory Election Adhered to by Lower Courts

In the intervening years since the above Supreme Court decisions, the various circuit and district courts have invariably followed the rule that a seaman must elect, *in advance of trial,* whether he will cast his action under the general maritime law of unseaworthiness or sue under the alternative remedy for negligence given him by the Jones Act.

This court inferentially followed the rule in the case of *Hammond Lumber Company v. Sandin* (1927) 17 F.(2d) 760, where the court said at page 762:

> "* * * But we think that the election required by the statute is sufficiently indicated where a person, entitled to the benefit thereof, brings an action at law alleging negligence and praying for damages. * * *"

In *Skolar v. Lehigh Valley R.R.* (2 C.C.A., 1932) 60 F.(2d) 893, it was argued that the plaintiff was not required to make his election between unseaworthiness and negligence in advance of the trial of the case but that such choice must be made after all of the evidence was presented. The Second Circuit, relying on the Supreme Court cases previously quoted, rejected the contention as follows:

> "* * * If he may present both bases for recovery in the same suit, we are unable to see wherein the statutory right is an alternative to the right to indemnity existing under the old maritime rules, or wherein he has been required to elect between the 'two inconsistent remedies.' * * *"

In a later case, *McGhee v. United States of America*

(2 C.C.A., 1947) 165 F.(2d) 287, this circuit affirmed its prior ruling as follows:

> "We do not mean that a seaman may go to trial on both causes of action simultaneously, and recover upon one or the other as the evidence turns out; we said the opposite in *Skolar v. Lehigh Valley R. Co.* * * *."

The Fifth Circuit was confronted with this identical question in *Smith v. Lykes Brothers-Ripley S.S. Co.* (1939) 105 F.(2d) 604, and the court restated the rights of a seaman for injuries as follows:

> " * * * Upon the facts as alleged, which must be taken as true on this appeal, three causes of action accrued to appellant when he was injured by reason of the unsafe condition of the ship, due to the negligence of appellee. The source of each was as follows:
>
> "(a) The right to recover wages, and the expense of maintenance and cure, which was an incident to his contract for wages, payable irrespective of negligence unless the injury was brought about by the seaman's willful misconduct.
>
> "(b) The right under maritime law, to recover indemnity for injury caused by the unseaworthiness of the vessel, which was predicated upon the negligence of the owner.
>
> "(c) The right, under the Merchant Marine Act, *supra,* to recover indemnity for a personal injury suffered in the course of his employment.
>
> "The legal wrong in the prior action was an invasion of the seaman's primary right of bodily safety, but the legal wrong in the present action was a breach of duty to provide the necessary maintenance and cure. The three causes of action, (a), (b), and (c), above mentioned, arose at the same

time but depended upon different facts and distinct principles of law. *The appellant was required to elect between (b) and (c), the tort actions* but no election was required as to (a), wherein the duty of the appellee arose as an incident to the contract for wages. * * * " (Italics ours)

Development of Minority Doctrine That Election Refers to Choice of Remedies Between a Civil Action and a Suit in Admiralty

Based upon a series of legal misadventures, the Third Circuit has recently evolved the novel doctrine that the statutory election required under the Jones Act is only between a choice of a civil action or a suit in admiralty and that actions for negligence and unseaworthiness can be comingled and enforced co-terminously. The genesis of this erroneous doctrine occurred in the case of *Branic v. Wheeling Steel Corporation* (1945) 152 F.(2d) 887. This case had nothing to do with the statutory election prescribed by the Jones Act but was concerned only with venue.

Misconstruing this decision, and the holdings of the United States Supreme Court in the case of *Baltimore Steamship Company v. Phillips* (1927) 274 U.S. 316, 71 L.ed. 1069, the Second Circuit next in the case of *German v. Carnegie-Illinois Steel Company* (1946) 156 F.(2d) 977, ignored the Supreme Court decisions and declined to require the plaintiff seaman to elect during the presentation of his case between negligence and unseaworthiness. The announced reason for this startling decision was that if the seaman made an improper election it might prove disadvantageous to him. This con-

sideration is obviously a matter of Congressional and not judicial concern.

The court cited the case of *Sieracki v. Seas Shipping Company* (3 C.C.A., 1945) 149 F.(2d) 98, as authority for such a holding. Yet the *Sieracki* case concerned a longshoreman who was not required by statute to make the election required of seamen by the Jones Act. In the *German* case the court did not attempt to further define the requisites of the statutory election.

This occurred in a subsequent case of *McCarthy v. American Eastern Corporation* (1949) 175 F.(2d) 724, where Judge Maris defined the statutory election prescribed by the Jones Act as follows:

> "In our view the election to which the Jones Act refers is an election of remedies as *between a suit in admiralty and a civil action.* Prior to the passage of the Jones Act, unless there was diversity of citizenship, a seaman was compelled in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the election clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action at law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of $3,000.00. For since an act of Congress, the Jones Act, gives the right the federal courts have jurisdiction of suits to enforce it under section 1331 of Title 28 U.S.C.A., section 24 (1) of Judicial Code of 1911, regardless of the citizenship of the parties."

This decision was predicated upon the *Baltimore Steamship Co.* case, *supra.*

In a perfunctory opinion, the Second Circuit in the case of *Balado v. Lykes Bros. Steamship Company* (1950) 179 F.(2d) 943, adopted Judge Maris' reasoning that the statutory election under the Jones Act pertains only to the selection of forum.

A detailed analysis of the litigation involved in the *Baltimore Steamship Company* case, *supra,* will conclusively establish the judicial misconstruction of its doctrine by the Third Circuit.

Phillips, a seaman, was injured in 1921 and filed a libel against the United States (286 Fed. 631). It originally charged both unseaworthiness and negligence but exceptions were sustained to the commingling of both grounds and Phillips thereupon elected to proceed on the grounds of negligence. The District Court said:

> "The libelant charges negligence of the owners of the ship in that the cleater sockets supporting the strongback were not of proper design or sufficient strength; that the owners of the steamship were incompetent and respondent owed a special duty to the libelant because of his youth and experience. The court dismissed the action, finding that libelant's accident was not due to the grounds of negligence alleged but to the gross negligence in the way the dunnage was being removed."

In the *McCarthy* case, *supra,* Judge Maris' statement that the libel in admiralty was based upon unseaworthiness is incorrect.

Phillips next instituted a second action at law. *Phillips v. Baltimore S.S. Company* (U.S.D.C., N.Y.) 295

Fed. 323, alleging that his accident was due to the negligence of the officers of his vessel in the operation of the same and of the winches and appliance and the failure to give warning to the plaintiff of the impending danger.

The complaint was dismissed on the grounds of *res judicata*. Judge Inch said:

> "The cause of action in both actions is to recover for personal injuries due to neglect of duty by defendants."

An appeal was taken to the Second Circuit of Appeals and while this appeal was pending the matter was remitted to the District Court which reversed its earlier dismissal of the action on the grounds of *res judicata* and the case was tried on its merits resulting in a judgment for the plaintiff. Defendant appealed to the Second Circuit, *Baltimore Steamship Company v. Phillips,* 9 F.(2d) 902, where the decision of the District Court was affirmed. The Circuit Court held the doctrine of *res judicata* was inapplicable and that the second action of Phillips could be maintained since the allegations of negligence therein differed from those in the initial suit. It held *res judicata* would not defeat recovery.

On appeal of the case to the United States Supreme Court (*Baltimore Steamship Company v. Phillips, supra*) the court ruled that the doctrine of *res judicata* applied and that the plaintiff was not at liberty to split up his grounds of negligence and prosecute them by piece meal. It dismissed the appeal for this reason. The court said:

> "Here the Court below concluded that the cause

of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the grounds alleged in the first case being the use of defective appliances and the second the negligent operation of the appliances by the officers and coemployees. On principle, it is perfectly plain that the respondent suffered by one actionable wrong and was entitled but one recovery whether his injury was due to one or the other of the several distinct acts of alleged negligence or to a combination of some or all of them."

The court further said:

> "The mere multiplication of grounds of negligence allegedly causing the same injury, does not result in multiplying the causes of action."

The court further said:

> "It follows that here both the libel and the subsequent action were prosecuted under the maritime law and every ground of recovery open to respondent in the second case was equally open to him in the first."

It is obvious by the phrase "maritime law," Judge Sutherland was referring to the Jones Act which he had discussed immediately prior to the above quotation and that his observation is based upon the rule of *res judicata* applied to a negligence action.

A study of the *rationale* of the *Baltimore S.S.* case, *supra,* establishes that the court was concerned solely with the aplication of the doctrine of *res judicata* after Phillips had made his initial statutory election under the Jones Act to sue for negligence. The effect of the decision is to establish that the seaman must plead all

possible grounds of negligence after electing to sue under the Jones Act. It affords no valid basis for the inferences placed upon it in the *German, McCarthy* and *Balado* cases, *supra,* justifying the rule that the statutory election under the Jones Act involves a choice of remedies between the civil action and a suit in admiralty.

The lower trial judge made a painstaking analysis of the extensive litigation involved in the *Baltimore S.S. Company* case and reached the above conclusion (R. 13, 14). This likewise was the opinion of United States District Judge Hall in the case of *Reed v. The Arkansas* (D.C. S.D. Cal.) 150 A.M.C. 1410:

> "I am unable to reconcile the plain language of the statute and the above cited cases with the third circuit case of *German v. Carnegie-Illinois Steel Corp.,* 1946 A.M.C. 1590, 156 F.(2d) 977.
>
> "Clearly an election must be made. Under the above cases, it cannot be made, either at the conclusion of the evidence, or after judgment. It, therefore, must and should be made before trial. It is just and proper that it should be made sufficiently in advance of trial to allow a defendant to prepare, and to know upon which cause of action he must prepare. For the same reason it is proper that the election be made before the defendant is required to plead. The motion in the instant case is proper at this time and it is granted."

See also *Burkholder v. United States* (E.D. Pa. 1944) 60 F.Supp. 700.

Requiring an election between substantive rights is a commonplace of legal jurisprudence as mentioned by

Judge Van de Vanter in the *Panama & Pacific Railway* case, *supra,* the court said:

> "There are many instances in the law where a person who is entitled to sue may choose between alternative measures of redress and mode of enforcement; and this has been true since before the Constitution."

It is to be further noted that sequentially the *Baltimore Steamship Co.* case, *supra,* was decided by the United States Supreme Court prior to its decision of *Plamals, Pacific Steamship Company* and *Lindgren* cases, *supra,* and in those subsequent cases, no reference is made to the *Baltimore S.S. Company* case as being contradictory to its previously announced doctrine of requiring an election.

To interpret the statutory election under the Jones Act as contended for by appellant would render that phrase utterly meaningless. It would defeat the specific Congressional mandate of the Jones Act which Congress has never subsequently revised.

It is an elementary rule of statutory construction that in the absence of ambiguity, words must be given their natural meaning. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part would be inoperative or superfluous, void or insignificant * * * " Statutory Construction, Sunderland (1943) Vol. 2 §4705, p. 3309.

Since prior to enactment of the Jones Act, the seaman had a choice of ~~formulas~~ Forum as to whether he would enforce his then remedy for indemnity by a civil action

at law or a suit in admiralty, the construction contended for by the appellant would give the seaman rights he already possessed of which Congress was aware when it passed the Jones Act. Congress cannot be presumed to have indulged in such meaningless legislation.

For the above reasons we respectfully contend that the pre-trial order of the lower court requiring appellant to elect between unseaworthiness and negligence under the Jones Act was correct in law and must be sustained.

Requiring Election Was Harmless Error

In any event, requiring the plaintiff to elect between negligence and unseaworthiness was harmless and non-prejudicial error since even if appellant's evidence established that he did step in a spot of grease on the deck which caused him to fall the condition of the deck was a transitory one which would not sustain an action for unseaworthiness against the ship owner.

Whether appellant slipped in any grease at all is a matter of conjecture and speculation from the record. The appellant tendered no evidence as to how long the alleged spot of grease had been on the deck previous to his fall nor how it got there. There can be no liability for unseaworthines for such unexplained or transitory condition of the deck and had the issue of unseaworthiness remained in the case, it would have had to be withdrawn from the jury's consideration as a matter of law.

In the case of *Cookingham v. United States* (3 C.C.A.) 184 F.(2d) 213; cert. denied, 340 U.S. 935, 95

L.ed. 675 where the seaman slipped on a substance, presumably jello while going doing a stairway leading to the chill box, the court said:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us. *Mahnich v. Southern S.S. Co.*, 1944, 321 U.S. 96, 66 S.Ct. 455, 88 L.ed. 561, is urged to the contrary. But that case is clearly distinguishable. There the seaman was injured by a fall from a staging which gave way when a defective rope supporting it parted. The rope, an essential part of the ship's gear, was itself inherently defective and, therefore, unseaworthy.
>
> "In the present case the stairway upon which the libellant slipped was perfectly sound, its unsafe condition being the sole result of the temporary presence of a foreign substance upon it. To extend the doctrine of unseaworthiness to cover such a case as this would be to make the shipowner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happening, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negligence, to correct the condition before he becomes liable for it. The ancient admiralty doctrine of unseaworthiness has never gone so far."

In the later case of *Shannon v. Union Barge Line Corporation* (1952) (3 C.C.A.) 194 F.(2d) 584, the

court followed the Cookingham rule in an action brought for unseaworthiness and under the Jones Act for an alleged spot on the deck. The court said:

> "Assuming that there was oil on the deck, how did it get there and who put it there? It is argued on Shannon's behalf that it must have come there through the act of other employees. Therefore, the argument runs, we are not concerned with the many cases denying recovery where no proof showed existence of a hazardous condition long enough to permit its discovery by the defendant. These cases embody the rule that a defendant is not to be held liable for injuries resulting from unsafe conditions on his premises unless he has had a reasonable opportunity to discover and correct the hazard. See Restatement of Torts, §343."

Certiorari was denied in this case at 344, U.S. 846, 97 L.ed. 658.

In *Daniels v. Pacific Atlantic Steamship Company* (1954) (E.D. N.Y.) 120 F.Supp. 96, the court considered the question of whether the mere presence of a spot of oil or grease constituted unseaworthiness, as a matter of law and rejected the contention. The court said:

> "The mere presence of grease or oil or other transitory substance on a deck of a vessel, causing one to slip and sustain injuries has been held not to constitute unseaworthiness. The ship owner is not an insurer of safety. *Hanrahan v. Pacific Transport* Co., 2 Cir. 1919, 262 F. 951, certiorari denied 252 U.S. 579, 40 S.Ct. 345, 64 L.Ed. 726; *The Seeandbee, supra; Adamowski v. Gulf Oil Corporation, supra; Cookingham v. United States,* 3 Cir., 1950, 184 F. 2d 213; *Holliday v. Pacific Atlantic*

S.S. Co., supra; Shannon v. Union Barge Line Corp., supra, and *Hawn v. Pope & Talbot, Inc., supra.* In the *Hanrahan v. Pacific Transport Company* case, the court determined that the temporary absence of a handrail did not warrant a finding of unseaworthiness. As heretofore stated, it was held in *The Seeandbee* case that the presence of grease and oil on the deck did not render the vessel unseaworthy. In the *Adamowski* case (93 F. Supp. 117), the plaintiff claimed he slipped while going through a dark passageway, where later an oil spot was discovered. The court said, * * * the defendant cannot be held liable for unseaworthiness * * *. 'The passageway in which the plaintiff slipped was perfectly sound.' In the *Cookingham* case, it was held that a transitory unsafe substance on a stairway, such as jello, was not unseaworthiness. In the *Holliday* case, the court followed the *Cookingham* case and held that wires protruding from a package or box in an ice-box, did not amount to unseaworthiness. In the *Shannon* case, the claimant slipped on an oil spot on a deck and fell against a metallic bar, running diagonally across a doorway. The bar was in good repair. It was held that no unseaworthiness existed. In the *Hawn v. Pope & Talbot* case, the court followed the *Cookingham* case and stated that a deck made slippery because of grain dust from loading was a transitory unsafe condition, resulting from the normal use and operation of the ship, involving no inherently defective condition and hence not unseaworthy."

Since the record affirmatively established that the alleged spot of grease in which appellant fell was a transitory condition which could not constitute an unseaworthy condition under the authorities cited it was

harmless and non-prejudicial error in requiring the appellant to elect between negligence or unseaworthiness, assuming such an election is required under the Jones Act.

Answers to Second Assignment of Error

This assignment is predicated upon an inacurrate and incomplete statement of the record. There is no evidence as to how the alleged spot of grease (if such it were) got on the deck nor how long it had been present before appellant's accident. Appellant did not see it and the credibility of appellant's two witnesses, Smith and Hamilton (neither of whom claim to have seen the spot of grease before the accident, but soon claimed they saw it afterwards) was completely destroyed by their conflicting written statements as reflected in the jury's verdict. The court submitted the case to the jury on the issue of negligence on proper instructions, none of which are assigned as error. In dealing with the "transitory object" doctrine in negligence the court instructed as follows:

> "To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not only that there was this oily condition, which caused the plaintiff to fall, but also that the defendant or its employees knew, or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it, the defendant is not liable for transitory danger of such character in the absence of actual constructive knowledge of the existence of the condition." (R. 296)

In the *Daniels* case, *supra,* the court said (p. 97):

> "There is no evidence that the oil on the wheelhouse floor was there for any length of time prior to the accident. Unless the defendant had actual or constructive notice of the condition so as to furnish it with an adequate opportunity to remedy the condition, then there is no cause of action for negligence under the Jones Act. *Boyce v. Seas Shipping Co.,* 2 Cir. 1945, 152 F. 2d 658; *Anderson v. Lorentzen,* 2 Cir. 160 F. 2d 173; *Lauro v. United States,* 2 Cir. 162 F. 2d 32; *Guerrini v. United States,* 2 Cir. 1948, 167 F. 2d 352; *Adamowski v. Gulf Oil Corporation,* D.C. 93 F. Supp, 115; Id. 3 Cir. 197 F. 2d 523, certiorari denied; *Adamowski v. Bard,* 343 U.S. 906, 72 S.Ct. 634, 96 L.Ed. 1324; *Holliday v. Pacific Atlantic S.S. Co.,* D.C. 99 F. Supp. 173, reversed on other grounds 3 Cir. 197 F. 2d 610, certiorari denied 345 U.S. 922, 73 S.Ct. 780, 97 L.ed. 1354; *Shannon v. Union Barge Line Corp.,* 3 Cir. 194 F. 2d 584, certiorari denied 344 U.S. 846, 73 S. Ct. 62, 97 L. ed. 658. The court adheres to the dismissal of the claim for negligence at the time both sides rested."

In *Blodow v. Pan Pacific Fisheries Company,* 275 P. (2d) 795, the California District Court of Appeals was concerned with a factual situation similar to the case at bar. The plaintiff personally saw no substance on the deck nor did anyone else. He ascribed his fall to "there was just no traction there." In dismissing the action for negligence under the Jones Act the court said:

> "Not having produced anyone, including appellant himself, who saw any foreign substance on the hatch cover, we are reduced to mere conjecture as to whether there was any substance, and if so, what

it was, and if determined, who placed or permitted it there, and how long before the unfortunate accident. Appellant's evidence being of such nebulous texture, it is readily understandable that the jury found for the respondents."

See also *Pietryzk v. Dollar Steamship Lines,* 31 Cal. App.(2d) 584, 88 P.(2d) 783.

Gladstone v. Matson Navigation Company, 269 P. (2d) 37, where the court said at page 39:

> "While generally there is an absolute liability on a shipowner regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness,and no fault or failure of appliance or equipment, the shipowners' liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness. Thus either under the Jones Act or the general maritime law pertaining to transitory conditions the rule is practically the same in requiring notice of the condition."

We submit that there is no merit whatever in this assignment of error and it would have been error for the lower court to have granted a new trial under the record and the law.

Answer to Third Assignment of Error

Undoubtedly the testimony was that when oil spill was discovered on the deck of the tanker "TIDEWATER" it was to be removed as soon as possible. This practice indicates the high safety standards enforced

on the M/V "TIDEWATER." But this salutary rule cannot be translated into making appellee shipowner legally liable for the presence of undisclosed and unascertained transitory objects on the deck of the vessel. Such a rule would make the shipowner an insurer as to the presence of any transitory objects on the deck. The courts have refused to place such an impossible and clairvoyant burden on the American shipowner as reflected in the authorities cited herein. Unless the shipowner has actual or constructive notice of the presence of a transitory object upon the deck and fails to remove it in a reasonable time, there is no liability under the Jones Act for negligence.

Appellant's contention that, absent knowledge of the existence of a transitory object on the vessel's deck, the shipowner is obliged as a matter of law to remove it immediately, finds no support in the authorities cited by appellant and is contrary to an unbroken line of decisions cited elsewhere in the brief. In reference to the case of *Adams v. American President Lines,* 23 Cal. (2d) 681 (146 P. (2d) 1) upon which appellant relies, it is to be noted that in the recent case of *Blodow v. Pan Pacific Fisheries, supra,* the California court in construing its earlier decision said:

> "Appellant relies strongly upon *Adams v. American President Lines,* 23 Cal. (2d) 681 (146 P.(2d) 1), in which a seaman slipped on an orange peel. While there is a factual similarity, the question raised upon appeal was dissimilar. The court there was concerned primarily with whether the acts complained of, the eating of oranges and the discarding of peels, were within the scope of authority or fellow-seamen, and it found (p. 687)

> that as well as work to a seaman 'Necessary incidents of life, therefore, such as sleeping, eating, washing, etc., are contemplated to be within the scope of the employment.' No such issue is involved in the instant case."

As recently stated by this court in *Freitas v. Pacific Atlantic Steamship Company,* 218 F.(2d) 649:

> "The law does not impose on the shipowner the burden of an insurer nor is the owner under a duty to provide an accident proof ship."

In *Manhat v. U.S.* (1955, 2 C.C.A.) 220 F.(2d) 143, the court likewise said:

> "Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle would be moved by one of these men."

We respectfully urge that there is no merit in this assignment of error.

CONCLUSION

We submit that appellant has advanced no valid reason why the jury's verdict in this case should be disturbed and respectfully request its affirmance by this tribunal.

Repectfully submitted,

Bogle, Bogle & Gates,
Edw. S. Franklin,
Attorneys for Appellee.

No. 14677

In the

United States Court of Appeals

For the Ninth Circuit

VANCE W. WILLIAMS,	*Appellant,*
vs.	
TIDE WATER ASSOCIATED OIL COMPANY,	*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

SAM L. LEVINSON
EDWIN J. FRIEDMAN
LEVINSON & FRIEDMAN
Attorneys for Appellant

1602 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

FILED

MAY 28 1955

PAUL P. O'BRIEN, CLERK

No. 14677

In the

United States Court of Appeals

For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,*

vs.

TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

SAM L. LEVINSON
EDWIN J. FRIEDMAN
LEVINSON & FRIEDMAN
Attorneys for Appellant

1602 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Page

Reply to Counter-Statement of the Case 1

Reply to Appellee's Argument on First Specification of Error 3

Reply to Appellee's Argument That Requiring Election Was Harmless Error 11

Reply to Appellee's Argument on Second and Third Specifications of Error 13

Conclusion 15

TABLE OF CASES

Balado v. Lykes Bros. S.S. Co. (2CCA) 179 F.(2d) 943 .... 3, 4

Boudoin v. Lykes Bros. S.S. Co. (U.S.S.Ct., Feb. 1955) 1955 A.M.C. 488 10

Engel v. Davenport, 271 U.S. 33, 70 L.Ed. 813 .... 5, 7

Hill, Jr., v. Atlantic Navigation Co. (D.C. Va.) 1954 A.M.C. 2150 4

International Stevedoring Co. v. Haverty, 272 U.S. 50 15

Lahde v. Soc. Armadora del Norte (9CCA) 1955 A.M.C. 828 .... 12, 14

Lindgren v. United States, 281 U.S. 38, 74 L.Ed. 686 5

Mahnich v. Southern Steamship Co., 321 U.S. 96 12

McGhee v. United States of America (2CCA) 165 F. (2d) 287 .... 3, 4

Pacific S.S. Co. v. Peterson, 278 U.S. 130, 73 L.Ed. 220 .... 6, 7, 9

Panama R.R. v. Johnson, 264 U.S. 375, 69 L.Ed. 748 .... 4-5, 7

Plamals v. The Pinar Del Rio, 277 U.S. 150, 72 L.Ed. 827 5

Reed v. The Arkansas (S.D. Cal.) 88 F.Supp. 993 4

Seas Shipping Co. v. Sieracki, 328 U.S. 85 12

Skolar v. Lehigh Valley R.R. (2CCA) 60 F.(2d) 893 .... 3, 4

Smith v. Lykes Bros.-Ripley S.S. Co., 195 F.(2d) 604 8

Page

Thomsen v. Durene B. (S.D. Cal.) 91 F.Supp. 549.... 4

U. S. A. Smith, Adm. (5CCA, March, 1955) 1955 A.M.C. 812 .... 9, 10, 11

STATUTES

Title 46, U.S.C.A., §688 (Jones Act) 4, 5

United States Court of Appeals
For the Ninth Circuit

VANCE W. WILLIAMS, *Appellant,* vs. TIDE WATER ASSOCIATED OIL COMPANY, *Appellee.*		No. 14677

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

REPLY TO COUNTER-STATEMENT OF THE CASE

Before discussing the authorities upon which appellee relies, we deem it advisable to direct the Court's attention to certain statements contained in appellee's counter-statement of the case which are not supported by the record.

The following statement appears on page 3 of appellee's brief: "After sanding this area appellant examined the foredeck for other oil spills requiring sanding but saw none (R. 142)." This statement infers that the appellant examined the entire foredeck including the area between No. 2 and 3 tanks where he later slipped and fell. That was not the fact. To the contrary, appellant testified that the inspection made by him was from forty to forty-five feet from

where the accident subsequently occurred. We quote from pages 142 and 143 of the record:

> "Q. And Mr. Williams, did you, in looking around did you look over in the area under the catwalk between tanks 2 and 3 to see if there was any oil or grease in that area?
>
> A. No, that is out of the immediate vicinity of where I was at that time.
>
> Q. Well, if there were any oil or grease in the vicinity under the catwalk and in the vicinity between 2 and 3 tanks, could you have seen it from where you stood?
>
> A. Not from where I were, no.
>
> Q. How far away in feet would you be from the area between, the catwalk between 2 and 3 when you were standing over here sanding at S-1?
>
> A. That must be forty, forty-five feet.
>
> Q. So you would have been obliged to have looked a distance of forty or forty-five feet?
>
> A. Yes, sir."

Appellee called only two witnesses to testify as to the conditions existing on board the MV "Tidewater"; Captain Robert W. Daly and Second Officer De Jong. As was pointed out in appellant's brief (pages 26 and 27) Captain Daly made no inspection of the deck on the day of the accident and Second Officer De Jong made only a casual inspection sometime prior to the accident and no inspection immediately following the accident. On page 4 of appellee's brief it is stated that Second Mate De Jong made routine inspections of the foredeck "both before and after Williams' accident." The record establishes that there was no in-

spection by Second Officer De Jong after the accident. De Jong was engaged for the better part of an hour in caring for the appellant (R. 271) and he did not have time to make a personal investigation (R. 266) of the accident because of other duties.

REPLY TO APPELLEE'S ARGUMENT ON FIRST SPECIFICATION OF ERROR

Appellee makes the bland assumption that the cases cited by the appellant set forth a minority doctrine. This assumption is based upon the appellee's rationale of a number of cases where the question at issue in this appeal was not directly involved, but where language used by the various courts which was not necessary to the opinion in the cases cited, was interpreted by the appellee to support its position.

The only two appellate cases cited by the appellee which were directly in support of its position were the cases of *Skolar v. Lehigh Valley R. R.* (2CCA 1932) 60 F.(2d) 893, and *McGhee v. United States of America* (2CCA 1947) 165 F.(2d) 287. Appellee cites these cases and quotes therefrom as present effective authority. At no place in its brief does appellee state that these two cases have been expressly overruled by the same Circuit with regard to the very question at issue in this appeal. *Balado v. Lykes Bros. S. S. Co.* (2CCA 1950) 179 F.(2d) 943. Counsel's brief refers to the *Balado* case as "a perfunctory opinion * * * (which) * * * adopted Judge Maris' reasoning that the statutory election under the Jones Act pertains only to the selection of the forum." (Appellee Br. 16)

As pointed out in appellant's brief (Br. 21) the *Balado* opinion expressly names the *Skolar* and *McGhee* cases as being overruled in so far as these cases hold that an action for damages under the Jones Act cannot be joined with an action under maritime law for unseaworthiness. It is significant that the Second Circuit in the *Balado* case refers to the language used in the *Skolar* and the *McGhee* cases in support of such election, as "dicta."

Not only is there no minority or majority rule as suggested by appellee, there are no cases in any appellate court which directly pass on the issue in this appeal which supports appellee's position. If the assumption of a majority view is based upon District Court or State Court cases which have passed on the question, simple mathematics establish that the great majority of such cases support appellant's position. Several of the District Court and State Court cases which have denied the right to join both causes of action have been expressly overruled by other cases in the same district. *Reed v. The Arkansas* (S.D. Cal.) 88 F. Supp. 993; *Thomsen v. Dorene B.* (S.D. Cal.) 91 F. Supp. 549; *Hill, Jr. v. Atlantic Navigation Co.* (D.C. Va.) 1954 A.M.C. 2150.

The remaining cases cited by the appellee involve issues other than the one in this appeal. Appellee cites language used in these cases in support of its position. We will briefly discuss the rules established by the Supreme Court cases cited by appellee.

In the case of *Panama R. R. v. Johnson* (1924) 264

U.S. 375, 69 L.Ed. 748, (quoted at page 7 of appellee's brief) the court merely passes on a right of a seaman to proceed at law or in admiralty and does not define the scope of "election" accorded. In the case of *Engel v. Davenport* (1926) 271 U.S. 33, 70 L.Ed. 813, (quoted at page 7 of appellee's brief) the primary questions confronting the court concerned the concurrent jurisdiction of State and Federal courts under the Jones Act and the application of the then two year statute of limitations in such cases. Any reference to election of remedies is pure dicta. The case of *Plamals v. The Pinar Del Rio* (1928) 277 U.S. 150, 72 L.Ed. 827 (quoted on page 8 of appellee's brief) the court holds that in an action where unseaworthiness is not proven no right of lien exists. Any reference in this case to an election under the Jones Act is again simply dicta. In the case of *Lindgren v. United States* (1930) 281 U.S. 38, 74 L.Ed. 686 (quoted on page 9 of appellee's brief) the court is only concerned with the second clause of the Jones Act having to do with death cases. This case holds that the Jones Act does not change the former rule to the effect that there is no indemnity for wrongful death under the general maritime law. Any reference to an election under the first clause of the Jones Act is also dicta.

We again repeat that the rule is now well established that where a seaman's injury was due to unseaworthiness of the vessel, or due to the negligence of the officers or members of the crew, or both, there is but a single wrongful invasion of the seaman's rights, and there are not two separate claims or causes of action.

The seaman is bound to proceed under both theories as a basis of liability in one action unless he wishes to run the risk of being deprived of relief altogether. *Pacific S. S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220 (quoted on page 9 of appellee's brief) illustrates the point perfectly.

In that case a seaman brought an action against his employer to recover damages for personal injuries suffered at sea. The shipowner defended on the ground that prior to the commencement of the action plaintiff had "elected to receive wages to the end of the voyage and maintenance and cure for any injuries which he received on said voyage" and that "the plaintiff in accepting said wages * * * and * * * maintenance and cure * * * elected to take compensation for said injury under the general admirality and maritime law * * * and the plaintiff cannot now elect to sue or maintain this action for damages under * * *the Jones Act." The Supreme Court defined the sole issue to be "whether if the plaintiff had demanded and received maintenance, cure and wages from the defendant this constituted an election which prevented him from thereafter maintaining a suit for compensatory damages under the statute" (278 U.S. at p. 136). The inquiry was thus directed to determining whether the action, if maintainable, would result in double recovery for the same legal wrong, or whether the right to maintenance and cure and wages is cumulative to the right of compensatory damages. In the course of its opinion, 278 U.S. at 136, the Court pointed out that

the general language used in *Panama R. Co. v. Johnson (supra)* does not define the scope of the election or the precise alternatives accorded, nor does the "incidental statement" in *Engel v. Davenport (supra)* define its scope. The Court concluded that the right to maintenance, cure and wages is cumulative to the right to recover compensatory damages, pointing out that the former grows out of the "personal indenture" created by the relation of the seaman to his vessel, that it does not extend to compensation for the effects of the injury, and therefore does not affect or displace the right to recover damages for injuries resulting from negligence or unseaworthiness.

In plain terms, the Court there held that recovery of maintenance, cure and wages is cumulative to the right to recover compensatory damages, and therefore recovery of the former does not bar the latter. But, recovery of damages under the new rules for injuries caused by negligence does constitute a bar to recovery of indemnity under the old rules for injuries occasioned by unseaworthiness, for the reason that, whether the injuries were caused by negligence, or unseaworthiness, or both combined, there is but a single legal wrong justifying but one recovery of compensatory damages.

Appellee relies heavily on the dicta in *Pacific S. S. Co. v. Peterson (supra)* and quotes a portion of that opinion(appellee's brief p. 9). In that portion of the quotation omitted by the appellee, the Supreme Court clearly recognizes that whether the cause of the seaman's injuries be based on negligence or unseaworthi-

ness there is but a single invasion of his primary right of bodily safety:

> " * * * Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. *But whether or not the seaman's injuries were occasioned by the unseaworthness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong,* (*Baltimore S. S. Co. v. Phillips,* 274 U.S. 321, 71 L.Ed. 1972, 42 Sup. Ct. Rep. 600) *for which he is entitled to but one indemnity by way of compensatory damages.*" (Italics supplied.)

The procedure adopted by the appellant at bar, before being compelled to make an election by the District Court, for the assertion of two grounds of liability in the present action did not and could not result in double recovery for a single legal wrong.

Appellee's statement that the Fifth Circuit in *Smith v. Lykes Bros.-Ripley S. S. Co.* (1939) 195 F.(2d) 604, was also confronted with the identical question (the joinder of a cause of action for negligence with unseaworthiness) is not borne out by the reading of that case. There the seaman had recovered a judgment in an action for personal injuries based on negligence. Subsequently he brought another action and sought to recover the amounts due him for maintenance and cure arising out of the same injury. The Fifth Circuit held that an action for damages and one

for maintenance and cure were two separate causes of action citing *Pacific S. S. Co. v. Peterson supra,* and that a recovery for personal injuries would not bar an action for maintenance and cure, unless the prayer for damages in the personal injury action included the same elements involved in a claim for maintenance and cure. Because of an incomplete record the case was remanded to determine if the elements of damages in maintenance and cure were included in the instruction on damages in the personal injury case.

It is thus apparent that that case hardly involves the "identical question" as appellee would have this court believe. As a matter of fact the Circuit Court of Appeals for the Fifth Circuit in a most recent decision, *U. S. A. v. Smith adm.* (CCA5 March, 1955) 1955 A.M.C. 812, assumes, as established by law, that an action based on unseaworthiness and negligence may be joined in the one action. We quote the opening lines of the opinion:

> "*Richard T. Reeves,* Ct. J.: 'This action by the administrator for the benefit of the parents and dependents of Jeff Smith, deceased, was brought under the Jones Act, 46 U.S. Code 688, as well as under the admiralty law for unseaworthiness."

The note 1 to the opinion in 1955 A.M.C. appears as follows:

> "Appellant does not contest that an action for unseaworthiness may be joined with an action for negligence under the Jones Act. See *McCarthy v. American Eastern Corp.* (3 Cir.) 1953 A.M.C. 1865, 69, 175 F.(2d) 724, 727."

At the present writing this case does not appear in the

Federal Reporter. We cannot state, therefore, if the same note appears in the Federal Reporter.

The opinion in *U. S. A. v. Smith (supra)*, affirms the finding of the District Court in favor of the plaintiff which held that the vessel was unseaworthy and that those in charge of her were negligent.

We direct this Court's attention to the most recent case of the United States Supreme Court in which a cause of action for personal injuries based on negligence and unseaworthiness was combined and considered. *Boudoin v. Lykes Bros. S. S. Co.* (U.S. S.Ct. Feb., 1955) 1955 A.M.C. 488. We frankly admit that the issue as presented here was not involved in that case. This case, however, assumes, as did the Circuit Court of Appeals for the Fifth Circuit, that a cause of action based on unseaworthiness and on negligence could be joined. We base this assumption upon the fact that no criticism or comment is made of such joinder. We quote the following opening portion of the opinion:

> "Mr. Justice Douglas delivered the opinion of the court:
>
> " 'This is a suit by an American seaman against the owner and operator of an ocean freighter, the Mason Lykes, upon which he was formerly employed. He based his claim for recovery both on negligence and on breach of the warranty of seaworthiness. The case was tried by the court upon waiver of jury. The district court found for the plaintiff, holding that the ship owner breached its warranty of seaworthiness and that its officers were negligent.' "

The Supreme Court in reversing the Circuit Court and affirming the opinion of the District Court found that there was sufficient evidence to support a cause of action for the breach of warranty of unseaworthiness. Therefore, it was not necessary for them to reach the question of negligence. However, Mr. Justice Reed concurred in the result on the ground of the negligence of the ship's officers.

It is significant that both in this case and in the *Smith* case in the Fifth Circuit no comment or criticism was made concerning the joinder of both unseaworthiness and negligence in one cause of action.

REPLY TO APPELLEE'S ARGUMENT THAT REQUIRING ELECTION WAS HARMLESS ERROR

We have some difficulty in understanding appellee's argument that the order of the Court requiring appellant to elect was harmless error. Appellee's entire argument is predicated upon the assertion that if appellant did step in an oily spot this was but a transitory condition and as such would not sustain an action for unseaworthiness against the owner of the vessel.

Appellee simply ignores and attempts to eliminate from the consideration of this Court the proof adduced at the time of trial concerning the unseaworthy condition of the foredeck of the MV "TIDEWATER" due to the use of hull paint on its deck rather than a non-skid deck paint. There was substantial evidence of the failure of appellee to use sand or other abrasives to be added to the hull paint on the foredeck. There

was evidence that the failure to use proper deck paint or to add sand and abrasives to the paint used made the deck dangerously slippery at all times, and even more so when wet or oily. Proof of this unseaworthy condition as a proximate cause of appellant's accident and injuries is clearly established by the record and definitely noted in appellant's statement of the case as set out on page 4 of his brief.

The testimony concerning the condition of the deck was sufficient to support a finding that the vessel was unseaworthy because of this condition. If it was unseaworthy, then the question of due care or the standard of a reasonably prudent man to be applied to the use of the preventive measures to keep the deck safe is not involved. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96; *Seas Shipping Co. v. Sieracki,* 328 U.S. 85. If the condition resulted in unseaworthiness of the vessel, then there is a liability upon the vessel, even though the unseaworthy condition was unknown to the owner. This Court recognized this ruling in the most recent decision of *Lahde v. Soc. Armadora del Norte* (CCA9) 1955 A.M.C. 828:

> "However, under recent decisions of the Supreme Court setting such a cause of action is stated even though the unseaworthy condition is unknown to the owner. *Boudoin v. Lykes Bros. S. S. Co., Inc.,* U.S. S.Ct., 1955 A.M.C. at 488."

The prejudicial error is apparent. Under the Court's ruling there was no instruction to the jury which would have submitted the rule of unseaworthiness, *i.e.,* that of absolute liability for consequential

damages arising from an unseaworthy condition. On the contrary, the jury was instructed that the sole responsibility of the ship owner was that of due care, that of a reasonably prudent man, etc. (R. 294, 295, 296). The instruction to the jury applied this test to those facts which established unseaworthiness, the condition of the deck with reference to the type of paint used and the method of applying the paint used. The jury was instructed (R. 297) and it was necessary for them to find that a reasonably prudent man would have used such paint or applied sand, before they could reach the issue as to whether or not non-skid deck paint was used or sand was applied. Under the evidence, even that of the defendant, such paint or sand was required and its absence rendered the ship unseaworthy.

REPLY TO APPELLEE'S ARGUMENT ON SECOND AND THIRD SPECIFICATIONS OF ERROR

Appellant's brief has heretofore discussed and set out his argument on his second and third specifications of error. We do not believe that the appellee's argument as set forth in its brief calls for repetition of the matter set forth in appellant's brief. We have some difficulty in finding where appellee answers the argument of appellant on these two specifications as both answers attempt to cover the same subject matter and rest primarily on some argument relative to a transitory condition.

We do feel, however, that it is necessary to call this Court's attention to the fact that appellee's statement

that the trial court's instructions were submitted without assignment of error, by appellee, is not correct. Specific exception was taken by counsel for appellant to the trial court's instructions before the jury retired (R. 309) and the error of the court had been previously called to its attention in prior discussion.

We find no argument in appellee's brief directed to appellant's second specification of error under that heading in appellee's brief other than the heading itself. We have been unable to find an answer anywhere in appellee's brief on this point. There is some discussion by appellee on the third specification of error, that relating to the requirement of notice, before a duty arises upon the vessel operator to clean up an oil spill.

If an oily condition of the deck would support an issue of unseaworthiness, under the evidence in this case relating to tankers, then, of course, no notice of any kind is required or is necessary to establish liability. *Lahde v. Soc. Armadora del Norte (supra)* p. 830, 1955 A.M.C.

With relation to the question of negligence, whatever may be the duty on dry cargo ships, under the testimony in this case there is an immediate duty to clean up oil spills when they occur. Here the standard of care is established by the testimony of appellee's own witness including the master of the MV "TIDEWATER," Captain Robert W. Daly. His testimony was to the effect that oil spills must be constantly guarded against and that there was a standing order requiring the immediate clean up of oil spills *as they occur* (R.

235). The existence of such an oil spill is of itself evidence that someone was not doing their job (R. 236, 237).

Under the rule of *International Stevedoring Co. v. Haverty,* 272 U.S. 50, liability of a vessel is established to an injured person arising out of the failure of duty or negligence of fellow servants.

Under the evidence in this case, oil spills on the deck of this ship cannot be classified as transitory as the appellee owner knew that spills constantly occur; hence the standing order. Under the facts of this case the instruction given by the court (R. 296) was error.

CONCLUSION

It is respectfully submitted that the trial court erred in accordance with specification of errors stated in this appeal and such errors are of an extremely prejudicial nature. The Judgment of the District Court should be reversed and the case remanded to it for a new trial.

Respectfully submitted,

Sam L. Levinson
Edwin J. Friedman
Levinson & Friedman
Attorneys for Appellant